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VIA ECF

January 17, 2012

The Honorable Nina Gershon, U.S.D.J.
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., Docket No. 06-CV-1842 (NG)(JO) (E.D.N.Y.)

Dear Judge Gershon:

On behalf of Defendant Allstate Insurance Company ("Allstate"), we respond to the letter of Plaintiff's counsel, John Spadaro, Esq., dated January 13, 2012. Since Mr. Spadaro feels free to submit update letters to Your Honor, Allstate would like to take this opportunity as well to update Your Honor on certain developments in the case law that are relevant to Allstate's motion to dismiss. Oral argument for said motion is currently scheduled for January 24, 2012 at 2:30 pm.

As an initial matter, Mr. Spadaro's reliance on *Stammco, LLC v. United Tel. Co. of Ohio*, No. F-11-003, 2011 WL 6352306 (Ohio Ct. App. Dec. 16, 2011), is misplaced, especially after the U.S. Supreme Court's decision in *Shady Grove I*. *See In re Katrina Canal Breaches Litig.*, 401 Fed. Appx. 884, No. 09-31071, 2010 WL 4561378, at *2 (5th Cir. Nov. 11 2010) (citing the U.S. Supreme Court's decision in *Shady Grove I*, the Fifth Circuit held, "Because Rule 23 governs the instant actions, and we conclude that the district court correctly applied the rule [to deny class certification], reliance on state court decisions in support of certification is unavailing."). A copy of this decision is attached as **Exhibit A** hereto.

Equally significant, in its opposition to the motion to dismiss, Shady Grove relies heavily on *Bulmash v. Travelers Indemnity Co.*, 257 F.R.D. 84 (D. Md. 2009), which granted class certification for failure to tender penalty interest under Maryland's no-fault law. *See* Md. Code Insurance § 19-508(c). To the extent the federal court in *Bulmash* relied on state court decisions,[1] that court's

[1] *See Bulmash*, 257 F.R.D. at 91 ("In several state court cases confronting nearly identical proposed classes, class certification has been found appropriate.").

decision should not be considered persuasive in view of the Fifth Circuit's holding in *Katrina*.

On November 28, 2011, the U.S. Supreme Court heard arguments in *First American Financial Corp. v. Edwards*, No. 10-708, in which the question presented is whether Edwards, a purchaser of real estate settlement services, has standing under Article III, Section 2 of the U.S. Constitution. Edwards contended that she was entitled to statutory damages pursuant to the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a). Edwards had alleged no actual harm, but nevertheless commenced a class action to recover statutory penalty allowed under RESPA. Here, Shady Grove also seeks to recover a statutory penalty in the absence of any actual economic damage. Accordingly, Shady Grove has not suffered any injury in fact to establish standing under Article III of the U.S. Constitution. For this Court's reference, a copy of the oral argument in *First American Financial* is attached as **Exhibit B** hereto.[2]

As set forth in Allstate's motion to dismiss and motion to strike the class allegations, Shady Grove's putative class is unascertainable because it constitutes an improper "fail safe" class. Allstate will not repeat those arguments here, but simply notes for this Court's reference subsequent cases denying class certification based on a "fail safe" class. *See, e.g., Schilling v. Kenton County, KY*, Civ. Action No. 10-143-DLB, 2011 WL 293759 (E.D. Ky. Jan. 27, 2011); *Jones-Turner v. Yellow Enterprise Systems, LLC*, Civ. Action No. 3:07CV-218-S, 2011 WL 4861882 (W.D. Ky. Oct. 13, 2011). A copy of those decisions is attached as **Exhibit C** hereto. Indeed, in order to respond to certain discovery requests propounded by Shady Grove, Allstate has had to engage in a bill-by-bill review to determine if statutory interest may have been owed to any particular medical provider. Indeed, medical providers will have to engage in similar bill-by-bill reviews to ascertain whether they belong to the putative class, an exercise they will unlikely perform in view of the cost and burden involved.

Shady Grove's "alternative class definition" does not cure the problem. Use of terms such as "never disputed," "timely fashion," and "no payment" inherently involves merits determinations of Plaintiff's claims. For example, the 30-day period is not absolute, and can be extended by, *inter alia*, requests for medical verifications. Likewise, "no payment" is conditioned by 11 N.Y.C.R.R. § 65-3.9(a) of Regulation 68 which provides in relevant part: "When a payment is made on an overdue claim, any interest calculated to be due in an amount exceeding $5 shall be paid to the applicant or the applicant's assignee without demand therefor."

Finally, the undersigned counsel for Allstate took the deposition of Shady Grove pursuant to Fed. R. Civ. P. 30(b)(6) last week on January 11, 2012. Although the transcript of the deposition is

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[2] During oral argument, Chief Justice Roberts observed, "And when we say, as all of our standing cases have, is that what is required is injury of fact, I understand that to be in contradistinction to injury in law. And when you tell me all that you want to plead is a violation of the statute, that doesn't sound like injury in fact." (Ex. B - Tr. at 31:20-25)

not available as of the date of this letter, Allstate will present a copy of the transcript at oral argument because the testimony will corroborate Allstate's argument that Shady Grove has no factual bases for the allegations in the Complaint. Specifically, the witness for Shady Grove, Bonita Nolan, testified that she (or to her knowledge, anyone else at Shady Grove) never reviewed, *inter alia*, the following: (i) the Complaint; (ii) any discovery requests from Allstate; (iii) any responses, including interrogatory responses (in violation of Fed. R. Civ. P. 33) to Allstate's discovery requests, and (iv) the documents production served by Mr. Spadaro. She further testified that she had only a couple of communications with Mr. Spadaro since 2006. She did not know that the initial Complaint was dismissed and that the case had been appealed to the Second Circuit or U.S. Supreme Court. To her knowledge, no one at Shady Grove authorized those appeals.

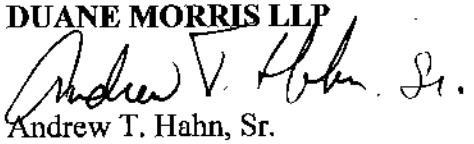
Ms. Nolan basically had no personal, first-hand knowledge of the factual bases for the allegations in the Complaint and merely received information from Mr. Spadaro, who admitted that the class action allegations were nothing more than legal conclusions. While she was familiar with the situation of the late payments relating to Maryland PIP, she admitted she had no knowledge with regard to New York State PIP. The lack of factual bases for the Complaint (and indeed after discovery) presents fatal issues with regard to lack of subject matter jurisdiction as well as class certification under the standards of *Twombly* and *Iqbal* and Rule 23. *See also Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551 (2011) (enforcing the rigorous analysis requirement of Rule 23).

The foregoing arguments will be included in Allstate's motion in opposition to class certification, but in the interest of full and immediate disclosure, the Court should be aware of the foregoing in anticipation of the oral argument on January 24th.

Thank you for Your Honor's attention.

Respectfully Submitted,

DUANE MORRIS LLP



Andrew T. Hahn, Sr.
Partner

Attachments
cc: John S. Spadaro, Esq. (Via ECF and E-mail)
James Yu, Esq. (Via ECF and E-mail)

Exhibit A

Westlaw

401 Fed.Appx. 884, 2010 WL 4561378 (C.A.5 (La.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 401 Fed.Appx. 884, 2010 WL 4561378 (C.A.5 (La.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.
In re: **KATRINA CANAL** BREACHES LITIGATION
Gladys Chehardy; Chuck Morris; Day Morris; Spencer Falou; Heather Falou; et al.,
Plaintiffs–Appellants
v.
State Farm Fire & Casualty Company; Allstate Indemnity Company; Allstate Insurance Company; American Insurance Company; Lafayette Insurance Company; Liberty Mutual Fire Insurance Company; Chubb Custom Insurance Company; AAA Homeowners Auto Club Family Insurance Company; Louisiana Citizens Property Insurance Corp.; Lexington Insurance Company; Encompass Insurance Company of America; Aegis Security Insurance Company; Great Northern Insurance Company; Hanover Insurance Company; Standard Fire Insurance Company, Defendants–Appellees.

No. 09–31071.
Nov. 11, 2010.

Background: Plaintiff insureds requested certification of class action against various insurers for alleged violations of Louisiana law requiring settlement or offer of settlement of claims within 30 days of receipt of notice of loss. The United States District Court for the Eastern District of Louisiana denied class certification, and insureds appealed.

Holdings: The Court of Appeals held that:
(1) questions of law or fact common to putative class of insureds' did not predominate over questions affecting individual class members, and
(2) district court had no obligation to notify putative class members of decision to deny certification of class or to advise members of their individual rights.

Affirmed.

West Headnotes

[1] Federal Civil Procedure 170A ⇐182.5

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak182.5 k. Consumers, purchasers, borrowers, and debtors. Most Cited Cases
Questions of law or fact common to putative class of insureds' did not predominate over questions affecting individual class members, and thus, certification of class was not appropriate on insureds' penalty claims against various insurers based on alleged violation of Louisiana law requiring settlement or offer of settlement of claims within 30 days of receipt of proof of loss; each insured's claim turned on reasonableness of insurer's conduct in deciding their individual claim, which was fact-specific inquiry that would vary based on individual circumstances of each claim, including nature of and extent of damage, where and how insured was paid and for what type of damage, whether insurer received timely notice of claim, and whether any payment was sufficient and timely. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; LSA–R.S. 22:658.

[2] Federal Civil Procedure 170A ⇐177.1

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions

401 Fed.Appx. 884, 2010 WL 4561378 (C.A.5 (La.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 401 Fed.Appx. 884, 2010 WL 4561378 (C.A.5 (La.)))

170AII(D)2 Proceedings
170Ak177 Notice and Communications
170Ak177.1 k. In general. Most Cited Cases

District court had no obligation to notify putative class members of decision to deny certification of class in action against various insurers, or to advise members of their individual rights. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

***885** Calvin Clifford Fayard, Jr., Esq., Senior Trial Attorney, Fayard & Honeycutt, A.P.C., Denham Springs, LA, Joseph M. Bruno, Bruno & Bruno, L.L.P., New Orleans, LA, Norval Francis Elliot, III, Esq., N. Frank Elliot III, L.L.C., Lake Charles, LA, for Plaintiffs–Appellants.

Wayne Joseph Lee, Esq., Stephen Glenn Bullock, Mary Lue Dumestre, Lauren E. Godshall, Stone, Pigman, Walther & Wittmann, L.L.C., Judy Y. Barrasso, Edward Robert Wicker, Jr., H. Minor Pipes, III, Steveo W. Usdin, Barrasso, Usdin, Kupperman, Freeman & Sarver, L.L.C., Alan J. Yacoubian, Neal J. Favret, Johnson, Johnson, Barrios & Yacoubian, John W. Waters, Jr., Bienvenu, Foster, Ryan & O'Bannon, L.L.C., Robert I. Siegel, Gieger, Laborde & Laperouse, L.L.C., Maura Z. Pelleteri, Krebs, Farley & Pelleteri, P.L.L.C., Ralph S. Hubbard, III, Seth Andrew Schmeeckle, Esq., Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA, Charles Louis Chassaignac, IV, Esq., Porteous, Hainkel & Johnson, L.L.P., Emile C. Rolfs, III, Esq., Breazeale, Sachse & Wilson, L.L.P., Baton Rouge, LA, Richard L. Fenton, Steven M. Levy, Alan Scott Gilbert, Kevin Peter Kamraczewski, Sonnenschein, Nath & Rosenthal, L.L.P., Chicago, IL, Kelly C. Bogart, Lawrence J. Duplass, Duplass, Zwain, Bourgeois, Pfister & Weinstock, A.P.L.C., William J. Wegmann, Jr., Wegmann & Adams, L.L.C., Metairie, LA, Daniel Winthrop Nelson, Esq., Melanie L. Katsur, Esq., Gibson, Dunn & Crutcher, L.L.P., Washington, DC, Richard Joseph Doren, Gibson, Dunn & Crutcher, L.L.P., Los Angeles, CA, Wystan Michael Ackerman, Stephen E. Goldman, Robinson & Cole, L.L.P., Hartford, CT, for Defendants–Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:05–CV–4182.

Before JONES, Chief Judge, and REAVLEY and HAYNES, Circuit Judges.

PER CURIAM: [FN*]

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

***886 **1** Plaintiffs–Appellants, who are policy holders of the various insurance company defendants, appeal following the district court's grant of a motion to strike class action allegations and subsequent dismissal of Plaintiffs' case. When the Plaintiffs declined the opportunity to refile their claims as individual actions, the district court dismissed. The claims stem from the Hurricane Katrina disaster in Louisiana. Plaintiffs sought, *inter alia*, certification of statutory penalty claims for the Defendants' alleged bad faith in adjusting their Katrina-related insurance claims. The district court held that class certification was improper because the claims required an analysis of myriad individualized, fact-specific issues. We AFFIRM.

The district court's denial of class certification is reviewed for an abuse of discretion, but we review the legal standards employed by the court de novo. *See Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, 334 (5th Cir.2010).

[1] "All classes must satisfy the four baseline requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation." *Anderson v. U.S. Dep't of Housing & Urban Dev.*, 554

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F.3d 525, 528 (5th Cir.2008); *see* FED.R.CIV.P. 23 . In addition, a putative class must also be one of the three types of class actions listed in Rule 23(b). *See Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir.2007). The issue in this appeal is whether the Plaintiffs' proposed class satisfied Rule 23(b)(3), which requires the court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" FED.R.CIV.P. 23(b)(3). The predominance inquiry is more demanding than the Rule 23(a) question of commonality. *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir.2003). The court must assess "how the matter will be tried on the merits, which 'entails identifying the substantive issues that will control the ontcome, assessing which issues will predominate, and then determining whether the issues are common to the class.' " *In re Wilborn*, 609 F.3d 748, 755 (5th Cir.2010) (citation omitted).

The Plaintiffs' underlying claims in this case are based on the Defendants' duties under state law to pay or make written offer to settle claims within thirty days after receipt of satisfactory proof of loss. *See* LA.REV.STAT. ANN. § 22:658 (now codified at LA.REV.STAT. ANN. § 22:1892). A cause of action for statutory penalties for violation of § 22:658 "requires a showing that (1) an insurer has received satisfactory proof of loss, (2) the insurer fails to tender payment within thirty days of receipt thereof, and (3) the insurer's failure to pay is arbitrary, capricious or without probable cause." *La. Bag Co. v. Audubon Indem. Co.*, 999 So.2d 1104, 1112–13 (La.2008). Penalties may not be assessed unless "the facts negate probable cause for nonpayment." *Id.* at 1114 (internal quotation marks and citation omitted). This standard requires an assessment of the reasonableness of the defendant insurer's conduct, and "when there are substantial, reasonable and legitimate qnestions as to the extent of an insurer's liability or an insured's loss, failure to pay within the statutory time period is not arbitrary, capricious or withont probable cause." *Id.*

****2** The district court held, and we agree, that class certification is not appropriate in this case because each Plaintiff's claim turns on the reasonableness of the Defendants' conduct in deciding whether to make payments to each individual Plaintiff. Such a determination is a fact-specific inquiry that will vary based on the individualized circumstances of each claim. Plaintiffs contend that the Defendants' bad faith ***887** may be adjudicated on a class-wide basis because they have alleged an over-arching scheme among the Defendants with respect to adjusting Hurricane Katrina claims. But even in the face of such a scheme, individualized issues will predominate, such as the nature and extent of a class member's damage, whether and how much a class member was paid and for what type of damage, and whether any payment was sufficient and timely. There will also be issues as to whether the class member fulfilled his duty to timely notify the insurer of the claim and whether there was sufficient proof of loss. All of these individual inquiries will be part of the overall determination of whether the insurer acted arbitrarily and capriciously, and therefore defeat class certification. *See, e.g., Maldonado*, 493 F.3d at 525 (holding that class certification not appropriate where reasonableness of medical fees charged to class members depended on multiple factors).

Plaintiffs contend that the reasonableness of Defendants' actions may be determined on a class-wide basis by focusing on a minimal standard of conduct under state law rather than merely the desired conduct of the insurers. We are unpersuaded. As noted by the district court, Plaintiffs' distinction between these purported standards for reasonableness is not supported by legal authority. Moreover, the Louisiana Supreme Court has defined the necessary inquiry into reasonableness as dependent "on the facts known to the insurer at the time of its action." *La. Bag*, 999 So.2d at 1114. This inquiry will necessarily involve detailed and individualized considerations of each class members' claim. Furthermore, because the state law provides an adequate basis for consideration of the case, Plaintiffs' re-

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quest for certification of the issues in this appeal to the Louisiana Supreme Court fails. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208 n. 11 (5th Cir.2007).

Plaintiffs also argue that certification is proper in order to avoid a disparity between the federal courts and the Louisiana state courts, which have permitted similar class actions. Federal class action certification is controlled by federal procedural rules, notwithstanding state law. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, —— U.S. ——, 130 S.Ct. 1431, 1437, 176 L.Ed.2d 311 (2010). Because Rule 23 governs the instant actions, and we conclude that the district court correctly applied the rule, reliance on state court decisions in support of certification is unavailing.

[2] Finally, Plaintiffs argue that the district court erroneously denied their request to order Defendants to notify individual policyholders of the district court's decision and the existence of their individual rights. They contend that the court was empowered to order such notice by FED.R.CIV.P. 23(d)(1)(B). Even assuming that the district court had the power to issue such an order, which we do not decide, there is nothing that requires the court to order notice of the denial of class certification, and we find no abuse of discretion in the court's refusal to do so. *See, e.g., Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir.1975) ("[W]here a court has ruled under Rule 23(c)(1) that an action cannot properly be maintained as a class action the notice requirements of Rule 23(e) do not apply ...."); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class.").

****3** AFFIRMED.

C.A.5 (La.),2010.
In re Katrina Canal Breaches Litigation
401 Fed.Appx. 884, 2010 WL 4561378 (C.A.5 (La.))

END OF DOCUMENT

Exhibit B

IN THE SUPREME COURT OF THE UNITED STATES

- x

FIRST AMERICAN FINANCIAL :

CORPORATION, SUCCESSOR IN INTEREST:

TO THE FIRST AMERICAN CORPORATION, :

ET AL., : No. 10-708

Petitioners :

v. :

DENISE P. EDWARDS :

- x

Washington, D.C.

Monday, November 28, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

AARON M. PANNER, ESQ., Washington, D.C.; on behalf of Petitioners.

JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on on behalf of Respondent.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 10-708, First American Financial Corporation v. Edwards.

Mr. Panner.

ORAL ARGUMENT OF AARON M. PANNER

ON BEHALF OF THE PETITIONERS

MR. PANNER: Mr. Chief Justice, and may it please the Court:

Article III requires a private plaintiff to show injury in fact, which means at a minimum that the alleged illegal conduct made her worse off. Factual injury does not automatically follow from violation of a statutory duty owed to the plaintiff, and Ms. Edwards has not alleged the type of harm alleged by plaintiffs in the common law cases that she invokes -- no misappropriation of her property, no loss of desired opportunity or benefit, no injury to reputation.

JUSTICE BREYER: Let me just get -- use an example, a hypothetical based on the next case, really: I was thinking Congress passes a law, says you can't phone people between 7:00 at night and 7:00 in the morning and try to sell them something, okay? That's the law. And anyone who gets such a phone call gets

$500 in damages automatically if they sue in court if they receive such a call.

The harm was getting the call. So my grandmother, who is always complaining no one ever calls her, loved the telephone call. She loved it. The best thing happened to her in a month, okay?

Now, can she sue?

MR. PANNER: No, Your Honor. If she does not have actual injury, the fact of the statutory violation would not give rise to standing in that case. Now, it's -- I think it would be quite unlikely that a plaintiff would come before the Court and say: Actually the statutory violation delighted me; I nevertheless would like my $500. But if the injury-in-fact requirement means anything, it means that a plaintiff who comes before the Court must have a harm in fact.

JUSTICE BREYER: In other words, if the FDA bans a substance on the ground that 98 percent of the people it hurts, and there is some kind of automatic recovery, $500 anybody who bought the substance because it wasn't supposed to be sold, and she's one of the 2 percent that it helped --

MR. PANNER: Well, Your Honor --

JUSTICE BREYER: -- you can't sue?

MR. PANNER: In the case -- in the case in

which someone is exposed to a substance that has -- that is illegal, they might well suffer a harm, and the harm might be the exposure to the substance. And the -- the sort of inquiry that you are looking into, which is even if the exposure ended up not being harmful, would that be a case?

JUSTICE BREYER: Well, here she was exposed, or the plaintiff was exposed, to the kind of transaction that Congress said was harmful as a general matter, just like the example you gave.

MR. PANNER: I don't think so, Your Honor. And the reason is that in this case, the violation -- as her complaint makes clear, she paid the only rate for title insurance available in Ohio. She does not complain of the quality of the insurance or the service she received. She does not maintain --

JUSTICE SOTOMAYOR: But, counsel, going back --

CHIEF JUSTICE ROBERTS: I'm sorry.

Justice Ginsburg.

JUSTICE GINSBURG: Because she can't prove it at the early stage, and the problem that Congress was concerned about was that you can't tell until the house is going to be sold in the end how adequate the title insurance was. So Congress is acting on the potential

that these kind of kickbacks can cause harm. And this does seem to fit the bill of restitution, unjust enrichment cases, where the plaintiff doesn't have to prove any harm, she just gets back what the defendant should not have received.

MR. PANNER: Your Honor, with respect to unjust enrichment cases, those cases reflect circumstances where there is a benefit received at the expense of the plaintiff. And in -- in the traditional sorts of cases -- unjust enrichment, of course, is an invention as a category that is relatively recent. But unjust enrichment cases reflect quasi-contract circumstances, where a benefit was conferred, that injustice should have been compensated, so the plaintiff is made worse off in not receiving the benefit or the compensation for the benefit; or a circumstance of constructive trust, where there was property or other right of the plaintiff that was misappropriated and used without the permission of the plaintiff. So an opportunity or a property was taken away.

This is not a case like that, and there is no allegation that there is anything lacking in the insurance that was issued. This is a circumstance in which Congress may believe that a certain practice as a general matter can tend to bring out -- bring about

bad -- bad outcomes and can therefore make it unlawful. But the question here is whether this plaintiff has a harm --

JUSTICE SOTOMAYOR: Counsel, are you taking a very broad position that this is an unusual State, it appears, with three or four others, where the States mandate that title insurance be at a fixed price. But in those States in which there is no such mandate, you seem to be arguing that Congress can't ever presume damages or injury, that even in those cases the plaintiff has to come in and prove that they would have paid less.

Is that the position you are taking?

MR. PANNER: No, Your Honor. The type of injury that is incurred doesn't necessarily have to be a financial one and there could be circumstances where a plaintiff would allege an injury -- and I -- it's important to --

JUSTICE SOTOMAYOR: No, no. Please tell me, in those States in which insurance is not fixed by the State, what does the plaintiff have to do other than to say, "they didn't disclose to me that there was a kickback and I want the amount I paid for the service"? Do they have to show something more?

MR. PANNER: If the -- I want to -- I'm not

sure I understand Your Honor's question, but if the question is, there were various rates available and the Plaintiff alleges an overcharge, that they purchased a -- a policy and there was a cheaper policy available, and as a result of the violation --

JUSTICE SOTOMAYOR: So you are in fact arguing very broadly that there is no presumption of -- of injury in these cases, that the plaintiff still has to come in and prove --

MR. PANNER: Your -- Your Honor --

JUSTICE SOTOMAYOR: -- that in fact they would have gotten a cheaper -- a cheaper policy?

MR. PANNER: Your Honor, the -- the plaintiff would have to allege in the complaint and then eventually show that there was some injury. It doesn't have to be a financial injury.

JUSTICE SOTOMAYOR: Same thing with nominal damages and statutory damages? You're -- you're taking a very broad position now.

MR. PANNER: I don't think so, Your Honor, because again the question for purposes of standing, the question for purposes of the ability of a plaintiff to come into court, is to show that they have some injury in fact, that there is some harm, some way in which they were made worse off. This plaintiff --

JUSTICE SCALIA: That's not so extraordinary. It is what has to be shown in -- in Sherman Act cases, right? Contracts and combinations in -- in restraint of trade are unlawful; but in order to recover under the Sherman Act, you have to show not only that it was unlawful, but that you were harmed by it.

MR. PANNER: That's true. That's certainly the norm in all sort of tort -- tort cases.

JUSTICE KENNEDY: I was going to ask you, along that line, are there any trust cases that -- that Respondents or the government could cite in which a party can go into court alleging that the market has been distorted, even though that person has no damage? Anything like that in the antitrust? What would be their closest case?

MR. PANNER: Well, Your Honor, I'm not sure -- I did not see any of the cases that they cited involving the trust -- the trust circumstance --

JUSTICE KENNEDY: Yes.

MR. PANNER: -- where there was that sort of vague allegation. The trust cases I think actually are a good illustration of the type of injury that is required. We are talking about trust, not antitrust now.

JUSTICE KENNEDY: Right.

MR. PANNER: But the trust cases involve a circumstance, the -- I think that the plaintiff here kind of gives the game away by, in the -- when talking about the Michoud case, using the phrase "the plaintiff may sue," and of course that's not what the case says. What the case says is that a -- that a beneficiary can come into court and say: The trust has violated the duty to me; I want to unwind the transaction to get the benefit that I would have gotten had the trustee behaved in the way required. So in those cases involving trustees, for example, they --

JUSTICE KENNEDY: There is not automatic disgorgement in those --

MR. PANNER: There could be automatic disgorgement, Your Honor. But again that reflects the lost value of what was paid for in terms of the -- of the --

JUSTICE SCALIA: Well, but --

JUSTICE KAGAN: Mr. Panner, I thought --

JUSTICE SCALIA: -- let -- let's assume that a trustee acts on its own interest and -- and sells property. But let's assume that he gets top dollar for that property, so that the beneficiary hasn't really been deprived of anything. What is the injury to the

beneficiary?

MR. PANNER: Well, the injury to the beneficiary in that circumstance, Your Honor, is that the trustee would have misappropriated an opportunity that belonged to the beneficiary. In the cases that are -- in the ordinary case, then, the beneficiary has the option to say, I would like to unwind that or get the benefit that the trustee got, if there was self-dealing. But in a circumstance where a trustee sells, for example, a piece of property and the -- and the claim is one for restitution to try to unwind the transaction that was done, it's the option of the beneficiary to say: You know what, maybe I am wrong but I think I would be better off if I could undo that transaction.

So it's a very conventional kind of harm where someone believes that their property was -- was taken away from them and used in a way to their detriment, and they are therefore seeking relief.

JUSTICE SOTOMAYOR: So what more does this plaintiff have to allege other than, if I had been told that this was a prearranged, tied product between the mortgage and the title company, but that I had a right to get an untied product even at the same price, and I would have exercised that right if I had known -- would

that be enough?

MR. PANNER: That might be enough, Your Honor. But that's exactly what she didn't allege.

JUSTICE SOTOMAYOR: Would that be enough in -- in Justice Breyer's example, of someone who says, I received a call at midnight and it bothered me?

MR. PANNER: Yes, I think that certainly would be enough, absolutely. The -- the point is that this complaint abstracted away any such particularized claim for a very particular purpose, which was that in order to maintain this case as a class action the basis of harm could not be anything personal or individual to this plaintiff.

JUSTICE SOTOMAYOR: So you go back to your position that Congress has no power to give a cause of action on the basis of a statutory violation in which it is presuming injury?

MR. PANNER: That is correct, Your Honor. The -- what Congress cannot do is to confer on a particular plaintiff an injury that is constitutionally sufficient under Article III. I think this Court has made clear that Congress cannot do that and that the existence of a statutory right by itself, even the invasion, the violation of the statutory right does not create injury for constitutional purposes. Injury --

JUSTICE SOTOMAYOR: Well, certainly you couldn't -- you couldn't sue. But if I paid money that I would have -- and that I'm entitled to get back, then I have been injured, because --

MR. PANNER: Well, Your Honor, you paid money -- in this case the plaintiff paid money for a title insurance policy which she received. She paid at -- at the legally required rate, and she makes no complaint about the policy, nor does she claim that it would have mattered to her --

JUSTICE ALITO: Could I ask you to clarify something? What could a plaintiff who purchases title insurance in Ohio allege that would be sufficient to provide standing?

MR. PANNER: Well, certainly if a plaintiff said that the -- that the manner in which the title insurance was provided had delayed her closing or that there were procedures that were --

JUSTICE ALITO: No, what could be done -- okay. Go ahead.

MR. PANNER: -- that there was something about the service that she received as a result of the -- the referral to a particular title insurer, again, assuming that this is a violation, which we don't -- we don't think it is. But -- but assuming that

it is, that --

JUSTICE ALITO: So you could -- the plaintiff could allege some kind defective service at the time when the title insurance was purchased? There really is no service provided at that time, is there?

MR. PANNER: Actually, most --

JUSTICE ALITO: You get a title insurance policy and that's it; and you don't know whether -- you don't know what will happen if there is some problem alleged with the title at some point down the road.

MR. PANNER: Well, that's really -- the -- the risk of that is really on the title insurer, which is why the title insurer has no incentive whatsoever to encourage poor service by a title insurance agent.

JUSTICE KENNEDY: Well, that -- that leads me to this point. I thought -- I never thought of title insurance companies as being fungible, and some were very, very good about narrowing the exceptions, about working with the seller of the property, if you represented the buyer, to get rid of the exceptions. And so I'm not sure that it's just a question of a policy versus no policy. There's a -- there's a quality to the -- to the research they do.

And the next -- and related to that is this: you -- you put the case as if the price is going to be

the same for the insurance. A, I think there is nothing in the -- in the State law that permits the insurance company to get -- to set a lower rate; and second, don't the title companies charge other fees, title search fees and so forth, other fees in addition to the price of the insurance? And those other fees, arguably -- I know she didn't allege any damage -- but those other fees arguably are too high because of this fixed market.

MR. PANNER: Well, Your Honor, that --

JUSTICE KENNEDY: Now, she didn't allege that. I know that.

MR. PANNER: She didn't allege it, and I think that's critical, because the -- the issue is not whether it's conceivable that an injury could occur from the violation. It could. And what you have indicated about difficulty clearing objections to a title, for example, if there was a problem that she had with respect to that and she believed it was the case, that would actually be the job of the title agent, which -- and there is no allegation that she was improperly referred to the title agent.

So the insurer is issuing -- underwriting the policy and bears the residual risk, but it's the agent that is actually engaged with the -- with the plaintiff here. And there, the agent's name here was

Tower City.

JUSTICE BREYER: Suppose Congress makes a finding; this is the finding: We think that lawyers or whoever is engaged in these who hire title insurance companies should hire the best one on the merits, not on the basis of which one will give them the biggest kickback. We think that's so because that will help keep people secure. Everyone in such -- who buys a house will feel more secure knowing that the market worked there. We can't prove who feels insecure and who doesn't. We think in general they would, and so we give everybody the right to recover $500 if they are injured, where the injury consists of being engaged in a transaction where the title insurance company was not chosen on the merits, but was chosen in whole or in part on the basis of the kickback.

And they write that right into the statute, so therefore there is no doubt that the plaintiff here suffered the harm that Congress sought to forbid. That harm was being engaged in a transaction where the title insurance company was not chosen on the merits, but partly in terms of a kickback. Now, what in the Constitution forbids Congress from doing that?

MR. PANNER: The Constitution, Article III, as this Court has interpreted it, requires that a

plaintiff that comes into court must have suffered an injury in fact, and Congress cannot create that injury legislatively. Otherwise, the Congress can enlist the courts for regulatory purposes that are unrelated to the core function of the Court as this Court has articulated it.

JUSTICE KAGAN: Mr. Panner, suppose there were a contract between Ms. Edwards and Tower and the contract had a no-kickback clause, not one that suggested that Ms. Edwards had to show any kind of injury, greater cost or lesser service, but just you can't have any kickbacks. Can she sue on that contract?

MR. PANNER: Well, if it was a negotiated agreement and it was -- it was one where the parties had given value for that assurance, then that would represent something that there had been a judgment in advance by this particular individual that that was something that was a performance that she was willing to pay for and a promise that meant something to her, and so that would potentially be a different case.

JUSTICE KAGAN: And now suppose that Congress passes a law and says every contract of this kind has to have such a provision in it.

MR. PANNER: Right.

JUSTICE KAGAN: Would she now have standing?

MR. PANNER: Most likely not, Your Honor. And the reason is that it's the difference between a contract that the parties engage in, where there would be a -- if there's a negotiated contract, it would be reasonable for the Court to say, well, there's value attached to the rights that the parties have bargained for here. But it's different if Congress is using it as a mechanism to create injury legislatively, and in that circumstance the court would still have to determine whether there was injury in fact that would allow the Plaintiff to get into court. But it's a different case.

JUSTICE SCALIA: Could Congress decree that the agent in this case shall be an agent of the purchaser rather than an agent of the title insurance company, as is done in real estate, I think? The real estate broker must be an agent of the seller and not of the purchaser. Can it establish a trust relationship between the purchaser here and the person selecting the title insurance company?

MR. PANNER: Well, I think that Congress could potentially create a trust relationship.

JUSTICE SCALIA: And if it did, would the violation of that trust relationship constitute injury for -- for Article III purposes?

MR. PANNER: Well, it would depend, Your

Honor. Not per se. It would depend on whether there was some way in which that violation caused an injury in fact. So, for example -- first of all, to the extent that there was some --

JUSTICE SCALIA: We don't require injury in fact for most breaches of trust, do we?

MR. PANNER: You do, Your Honor. That is to say that in the case of any of the examples that the plaintiff has cited there is an underlying interest, an antecedent interest, a concrete interest in property or in an economic opportunity, paid-for services of an agent, and it is that concrete interest which is invaded by the -- by the alleged violation of the responsibility of trust.

But of course here you don't even have that relationship of trust. As --

JUSTICE SCALIA: Well, I understand, but I'm just saying that that concrete interest can be created by Congress instead of being created by contract. What difference does it make? If you become a trustee by contract you get one result, but if you are a trustee by government decree so that you must be a trustee, contract or not, somehow the situation changes?

MR. PANNER: I don't -- I don't think the situation would change. I guess what I'm saying is that

even -- I don't see any of the common law cases involving trusts, trustees, as involving recoveries or suits in the absence of what this Court would certainly consider to be an injury in fact, that is to say some harm to a concrete interest that exists apart from the statutory duty or the common law duty.

JUSTICE KAGAN: Mr. Panner, in response to Justice Scalia's questions and my questions, you are suggesting that there is a difference depending on what the source of the law is. If the source of the right is a contract, there is one result. If the source of the right is a statute, there is another result. And I thought that that was very much -- that is -- that's very much inconsistent with our case law, and specifically with Lujan.

MR. PANNER: I certainly didn't mean to say that, Your Honor, so let me try to clarify. The question was, there are circumstances in which the legal relationship is such that there could be -- let me back up.

The question is whether there is an injury in fact, that is to say a harm that exists as a factual matter, and those interests certainly can be reflected by the legal duties that are created. So, for example, there are legal duties in contract that are intended to

protect the interests of the contracting parties. There are legal duties under the law of trust that are intended to protect the beneficiary.

But this Court has frequently reflected the fact that there is the question of the violation, but then there is separately the question of the injury. And the point that I'm making -- and it should be the same answer with respect to your question and Justice Scalia's -- is if the mere fact of a violation of a duty does not create injury per se, and none of the cases reflect that, and that is the proposition that plaintiff relies on here, precisely because of what she alleged and what she is attempting, the type of case that she is attempting to bring. She is attempting to bring a case in which the statutory violation is the injury. No other injury is required. She very straightforwardly says, it does not matter if there is any economic harm, it does not matter if there is any quality difference, it does not matter if there is any consequential effect on me at all.

JUSTICE KAGAN: I'm not sure that that's the right understanding of her complaint. She is saying: I don't have to prove those things because there's been a judgment made that these kinds of practices tend to decrease service and tend to increase price and

therefore I don't have to prove those matters. And that's the exact same judgment that is made in the trust cases, for example.

MR. PANNER: Again, I don't think that the trust cases can be fairly read to say that, Your Honor. But the key point is that there is a distinction between what Congress -- the statutory duties that Congress can impose and the manner in which Congress can choose to have those enforced -- well --

JUSTICE GINSBURG: Suppose she appended to her complaint an affidavit by a well-respected economist that says: Congress was right; these kind of arrangements will have an adverse effect on the people who are purchasing title insurance, and goes through all kinds of analyses that show that. Would that be adequate then?

MR. PANNER: Well, at the pleading stage it might be, Your Honor. That is to say that if the question were whether there was an allegation, certainly it's possible that there could be a sufficiently concrete allegation in a complaint that there was that sort of an impact, but -- and this is critical -- not only was that not alleged here, but the mere fact that there is a statutory duty does not reflect that's the judgment or, you know, the fact that there's been any

sort of many systemic effect.

Congress has broadly prohibited practices involving kickbacks and the paradigm case has nothing to do with a situation in which a title insurance agent is issuing a title insurance policy for an underwriter.

Now, it's not to say that Congress can't pass a broader prohibition and -- you know, and require that it be enforced. Well, Congress can pass a broader prohibition and then the executive could enforce it. But what Congress cannot do is to dictate in advance that a particular practice has caused injury to a particular plaintiff.

JUSTICE KAGAN: Counsel, I'm still having problems.

JUSTICE KENNEDY: Just following up Justice Ginsburg's hypothetical, suppose the Congress works with economists and concludes there is a reasonable probability that if there were no kickbacks there would be a more competitive market, there would be lower prices for some of the escrow fees, some of the collateral fees in addition to the title insurance. And the plaintiff then alleges that there is this reasonable probability that there would be a more efficient market, resulting in cost savings. Would that be enough?

MR. PANNER: Well, Your Honor, there has to

be a connection between the violation alleged and the harm that ensues, and so a general understanding that --

JUSTICE KENNEDY: Well, the person alleges: And I was in this market and I might have -- there is a reasonable probability that I could have had a lower price, according to economic theory.

MR. PANNER: Well -- well, again, that wasn't alleged here. So the question --

JUSTICE KENNEDY: I'm assuming it's alleged.

MR. PANNER: I understand that, Your Honor. So the question would be particular to the allegations that were made. In a case like this one, it's in all likelihood a generic allegation that there had been -- that there was some sort of systemic effect is -- it would be insufficient. That would be a speculative sort of claim of harm and that would be really something where if it's a general systemic effect with no traceability between the violation that's alleged and any supposed harm to the plaintiff, that that would be something for the executive.

Mr. Chief Justice, if I can reserve --

JUSTICE ALITO: If the plaintiff went further and alleged some harm particular to her, wouldn't that be even more speculative, some economic harm particular to her? I don't want to take up your

rebuttal time, but --

MR. PANNER: Thank you, Your Honor.

I think it would depend. I mean, certainly there are all sorts of circumstances where there is broad systemic harm, but yet the harm to the plaintiff is very clear, if you think about, for example, about price-fixing.

If I could reserve the remainder.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Panner.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN

ON BEHALF OF THE RESPONDENT

MR. LAMKEN: Thank you, Mr. Chief Justice. And may it please the Court:

For at least 280 years the law has been clear that when someone breaches a duty of loyalty owed to you by taking a kickback or otherwise introducing a conflict into a transaction, you can sue on the basis of that alone, without showing a further harm in terms of economic loss. The invasion of your right to conflict-free service was itself a sufficiently concrete and particularized injury in fact, not an abstract and undifferentiated --

JUSTICE SCALIA: You speak of a duty of

loyalty. There is no duty of loyalty owed here. It was just a law that said you cannot get -- and I'm not even sure it's proper to call it a kickback. It's a commission. These people are agents for the title insurance company and they get a commission on -- on every sale of title insurance that they make. You can call it a kickback, I suppose. I don't know why the other side does. But, but -- but it seems to me a commission. There is no duty of loyalty. Isn't the -- isn't the seller here the agent of the title insurance company?

MR. LAMKEN: Congress could have made them, the agent, could have, as you pointed out, could have made them a full-fledged fiduciary. Elevating your interest in having no conflicts whatsoever in the transaction to establish -- -

JUSTICE SCALIA: We'd have a different -- we'd have a different case then. But they didn't do that, did they?

MR. LAMKEN: Congress actually elevated one component of that by giving you a right to -- freedom from a particular conflict of interest, and that is the kickbacks that undermine their incentive to serve your best interest, that undermine their incentive to choose the insurer that provides the best quality and the best

service.

JUSTICE ALITO: Well, this is where I have problems with your argument, because this doesn't seem to me to be a fiduciary relationship and I don't see where the duty of loyalty comes from. And to say that Congress can just impose some attributes of a fiduciary relationship wherever it wants seems rather strange.

Let me give you this example. I take my car to an auto dealer to have -- because it's making a strange sound. And I say: Call me up when you figure out what you think is the problem. And they call me up and they say: Well, there are certain things wrong with it, and it's going to cost you $1,000. And I say: Okay, now, thanks for diagnosing the problem; where should I have it fixed? Should I have it fixed at your shop or should I go to another place and have it fixed? And they say: Well, have it fixed at our shop. Now, is there a breach of a duty of loyalty there?

MR. LAMKEN: Well, you might have an interest in getting an honest opinion. It's just not protected by law. They are allowed to tell you what they want to tell you because you have no protected interest in their opinion.

JUSTICE ALITO: I know. But we are looking for whether there is an injury in fact. Put aside the

question of whether there is a breach of the duty in law. There is allegedly here. I just don't see where there is an injury in fact, because I know -- I'm an idiot if I don't realize -- that they have a strong economic incentive to say: Come have it fixed at my place.

MR. LAMKEN: Well, in fact, Your Honor, Congress is entitled to elevate your interest in obtaining honest judgments or conflict-free advice to legal protection. Whether you would be an idiot in accepting it or expecting it in the first instance, they can take that relationship and make it confidential and make it an honest one, even if you hadn't expected that in the first place.

JUSTICE SCALIA: Well, the issue isn't whether they can afford it legal protection. They certainly can. And there can be suits by -- by the Federal government or I think under this statute even by State, State attorneys general. The issue isn't whether Congress can achieve that result. It's whether they can achieve it by permitting private suits.

MR. LAMKEN: Right. But the common law was absolutely clear that when someone invaded your right to a conflict-free transaction, invaded your right not to have kickbacks in your transactions, you didn't have to

prove that there was an economic consequence. The invasion of your right not to have conflicts invade that transaction was sufficient.

JUSTICE KENNEDY: Could you tell me, just with Justice Alito's automobile hypothetical, just as a matter of agency law -- I'm a little rusty on this one. If the auto repair people phone and say, and you need two parts and we will purchase those parts for you, and they then purchase parts from a company that they own, under standard agency law could the vehicle owner get disgorgement?

MR. LAMKEN: If they are acting --

JUSTICE KENNEDY: And he doesn't know, they haven't been informed --

MR. LAMKEN: If that is an agency duty, and we assume that that's an agent; they are acting as agent for the person with the broken car -- the answer is absolutely, without having to show any loss. And this Court's case in Magruder v. Drury was that type of case, where it was absolutely clear that the plaintiff would not have paid a cent more, the estate would not have paid a cent more if that -- if they had gone elsewhere to make the purchase.

JUSTICE SCALIA: If I take my car to an auto mechanic, he's not my agent. He's an independent

contractor doing business. He's not my agent.

MR. LAMKEN: That's exactly why I said --

JUSTICE SCALIA: And it's not an agency relation here, either. It's a customer going to somebody who is an independent contractor.

MR. LAMKEN: Congress imposed one component of the duty that applies to agents and fiduciaries across the board and that is: Don't take kickbacks that undermine the incentive to obtain the best deal offered a consumer.

JUSTICE SCALIA: It wasn't agents and fiduciaries across the board. He is neither an agent nor a fiduciary. And what's the closest case you have to a situation where there is neither an agency relationship nor a trust relationship, and yet this kind of a right to sue without showing damage exists? What's your -- what's your best shot?

MR. LAMKEN: Well, the law has a number of contexts where you don't have to show financial losses. If somebody defames you, you don't have to -- in your business, you don't have to show that you are financially injured. That's injury in fact in and of itself.

CHIEF JUSTICE ROBERTS: Well, that gets to a point that I am having trouble getting my arms around.

It seems to me what your position is, what you want us to focus on, there are three possible arguments. One is that there is injury in fact in this case. I see some of that argument in your briefs. Two, that Congress presumes injury in fact. Injury in fact is still required, but that is presumed. I read that to be perhaps what the trust cases say. Or three, that injury in fact is not required at all. Now, which are you arguing? One, two or three?

MR. LAMKEN: I think our argument is that the invasion of your statutory right to a conflict-free service is itself an injury in fact --

CHIEF JUSTICE ROBERTS: Okay, statutory right.

MR. LAMKEN: But it also has --

CHIEF JUSTICE ROBERTS: Could I? I'm sorry to interrupt you, but I want to pause on that question. You said violation of a statute is injury in fact. I would have thought that would be called injury in law. And when we say, as all our standing cases have, is that what is required is injury in fact, I understand that to be in contradistinction to injury in law. And when you tell me all that you've got or all that you want to plead is violation of the statute, that doesn't sound like injury in fact.

MR. LAMKEN: It's injury in fact in the following two senses, Judge -- Mr. Chief Justice. First, all you have to do -- getting a conflict-free referral is itself substantively more valuable than getting one laden by conflict.

CHIEF JUSTICE ROBERTS: Okay. Now, that goes back to the first proposition. That is an argument that there is injury in fact here. So it seems to me that -- I don't mean this in a pejorative sense, but it seems to me that you slide back and forth between one, two, and three, which makes it hard for us to get a decision.

MR. LAMKEN: I think the answer is so long as Congress has entitled you to something of potential value that isn't being denied to every other member of the public in an undifferentiated way, that is sufficient to be injury in fact.

CHIEF JUSTICE ROBERTS: Potential value.

MR. LAMKEN: Potential value. And it's more valuable --

CHIEF JUSTICE ROBERTS: Now, we said in the Whitmore case, and this is a quote: "Allegations of possible future injury do not satisfy the requirements of Article III." Potential value sounds to me like possible future injury.

MR. LAMKEN: In this sense, Your Honor. What you received is substantively less valuable. All you have to do is ask yourself: Would I value more advice from somebody who is playing it straight on the financial side or someone who is taking kickbacks from the --

CHIEF JUSTICE ROBERTS: So that is injury in fact?

MR. LAMKEN: That is injury in fact, and there is another way in which it's injury in fact.

CHIEF JUSTICE ROBERTS: So if you tell me what this case is about is whether or not you've shown injury in fact, it's not a significant -- significant case, and your client has to prove that at trial.

MR. LAMKEN: Well, she proved that she got something less valuable. She got something she was entitled to --

CHIEF JUSTICE ROBERTS: But I thought -- and maybe it's a unique circumstance in this case, but Ohio says this is going to cost you the same no matter what you do.

MR. LAMKEN: That is actually quite incorrect, Your Honor.

CHIEF JUSTICE ROBERTS: Okay. But then again, that's an argument about was there or was there

not injury in fact.

MR. LAMKEN: Well, the injury in fact is getting something that is potentially -- not getting something to which the law entitles you, which has potential value to you. And a conflict-free referral is much more valuable than one laden by conflict.

And there is another thing. We haven't disclaimed the notion entirely. We haven't -- in fact we believe it is very likely that -- that quality or price suffered as a result of these -- of these conflicts. But --

CHIEF JUSTICE ROBERTS: That sounds, again to use a word that we have said is inadequate to support standing, that sounds conjectural.

MR. LAMKEN: No, it is not, It's not conjectural at all. Congress specifically found that these are the consequences. But the reason --

CHIEF JUSTICE ROBERTS: No, no, no. We are talking about not what Congress found; but what the injury in fact is.

MR. LAMKEN: Your Honor, so -- -

CHIEF JUSTICE ROBERTS: You will agree, won't you, that the idea that it's certainly possible or whatever your formulation was, that the quality here wasn't good enough or that the entire quality across the

board might be better, that's conjectural, right?

MR. LAMKEN: No. Well, Your Honor, it is very hard to prove. And it was for that exact reason that --

CHIEF JUSTICE ROBERTS: Now we in point -- now we are at level two: It's hard to prove. So is that your argument, that Congress presumed injury?

MR. LAMKEN: No, Your Honor.

CHIEF JUSTICE ROBERTS: Okay.

MR. LAMKEN: That's why the common law elevated the right to conflict-free services from not being legally protected to legal protection, because it was so hard to figure out, for the judge --

JUSTICE BREYER: What is the -- I think this is very interesting and informative to me. Go back to the middle category. As I am now seeing it, have you a version of the middle category that the Chief Justice was asking. And -- and call it Congress sometimes passes a statute that creates a pariah. It could be a substance, it could be a form of behavior, it could be a structure of an industry.

And then once it does that, it makes that unlawful. And now what it's done, it is more unusual than I ever thought. It comes up in the loyalty context, fiduciary, but we are not talking about

fiduciary. It says it is a harm and you will earn money if you deal with a pariah, assuming it wasn't your fault.

Now, that's -- that's where I have ended up with your answers to the Chief, and now, having put it that way, I can find loads of examples in my mind where there is a trustee or fiduciary involved. I can think of an example in the qui tam context, but to think of one right on point is a little hard, though I thought there must be some.

MR. LAMKEN: Justice Breyer, the breach of contract, in some sense, is precisely that pariah.

JUSTICE BREYER: The what?

MR. LAMKEN: A breach of contract. If somebody breaches -- a contractual duty owed to me, I don't have to prove that I suffered economic injury. The breach of the promise itself gives me a grievance sufficient to entitle me to sue for nominal damages and --

JUSTICE BREYER: You mean you can sue in court even if what you come in and you say, they breached my contract, and as a result, I made $10,000 I wouldn't have otherwise made? And when the judge says "And what damages do you seek," you say?

MR. LAMKEN: I would like $1 more, Your

Honor. I want nominal damages or --

JUSTICE BREYER: And you can do that?

MR. LAMKEN: Or -- or -- so, if there are stipulated liquidated damages, you are entitled to those as well. That is the common law rule for years --

JUSTICE BREYER: No liquidated --

MR. LAMKEN -- and that is the majority rule today.

JUSTICE BREYER: Okay.

MR. LAMKEN: So that is -- that is precisely the context. But if I --

JUSTICE SOTOMAYOR: Counsel --

CHIEF JUSTICE ROBERTS: So you would accept $1 in this case?

MR. LAMKEN: Well, Your Honor, we are in -- I think that that is --

(Laughter.)

MR. LAMKEN: We are hoping to do better, Your Honor. But that actually illustrates --

CHIEF JUSTICE ROBERTS: Well, no, that -- that gets -- I didn't mean to be facetious, but it gets to the question of whether or not you have to actually show injury-in-fact. Your allegation in this case is for damages, not just nominal damages but damages.

MR. LAMKEN: Your Honor, if the injury is

sufficient to get you in court to get $1 --

JUSTICE GINSBURG: Is that --

MR. LAMKEN: -- it doesn't evaporate just because you want to get --

JUSTICE GINSBURG: Mr. Lamken, you are not seeking damages. You are seeking what the statute says you can get which is your money back treble?

MR. LAMKEN: Exactly, Your Honor. We are seeking precisely what the statute and title does when there is the breach of this duty owed to us --

JUSTICE GINSBURG: So it's not that you have to prove --

MR. LAMKEN: -- for our protection.

JUSTICE GINSBURG: -- any other damages because the statute has specified what the recovery is.

MR. LAMKEN: Exactly right.

CHIEF JUSTICE ROBERTS: Do you want -- I'm sorry.

MR. LAMKEN: One injury not to, one injury-in-fact, a violation of a duty owed to us for our protection, not an additional injury in the form of having suffered an economic loss.

CHIEF JUSTICE ROBERTS: Do you want to get out of this contract?

MR. LAMKEN: Pardon?

CHIEF JUSTICE ROBERTS: Do you want to get out of this deal?

MR. LAMKEN: Your Honor, I don't know whether or not Ms. Edwards would want to get out of the deal or not. But the statute says that she doesn't have to give up her insurance which protects her home in order to obtain the benefits of -- that Congress guaranteed her which were --

CHIEF JUSTICE ROBERTS: I didn't see -- I didn't see an allegation for a decision or -- or -- so you are perfectly happy as far as we know from the complaint with this deal, you just want the extra $500 per class member without showing any injury --

MR. LAMKEN: I think this -- I think this brings me back to the question you were asking me before, which is indeed, we think it's like that there is -- that there are diminution in quality and paying excessive price, but the law says we don't have to prove that because the law's elevated our right to a conflict-free transaction to legally protect its status.

The very reason the common law said in the fiduciary and the trust and all the other confidential issues in context said we are not going to ask about the economics, we are not going to regulate the economics here, because that's too hard. What we are going to do

is we are going to protect your right to receive the best advice possible. And at that --

JUSTICE SOTOMAYOR: Counsel, maybe I'm just looking at this too simply. You pay -- your client paid $455 for title insurance, correct?

MR. LAMKEN: Yes.

JUSTICE SOTOMAYOR: She is claiming that she paid that money on the statutory assumption that the agent would disclose to her any kickbacks, correct?

MR. LAMKEN: It's not a disclosure duty but on the statutory basis that she was entitled to a conflict-free referral. That they were not directing her purchase on the basis of complex that is so --

JUSTICE SOTOMAYOR: She said I didn't receive what I paid for, correct?

MR. LAMKEN: Exactly, Your Honor.

JUSTICE SOTOMAYOR: I paid money, I lost the money, I have it back because what I've bought was a conflict-free --

MR. LAMKEN: That's exactly right.

JUSTICE SOTOMAYOR: -- referral, and that's not what I got?

MR. LAMKEN: Like an aggrieved trust beneficiary, she is seeking to get back something that belonged to her, $455 that she parted company with in a

conflicted transaction.

CHIEF JUSTICE ROBERTS: You -- you don't want the conflict-free transaction because you don't want to get out of this contract. You are perfectly happy with the contract. You want $500. You don't want a conflict-free transaction because even if it was a -- were a conflict-free transaction, the price would be the same, in Ohio.

MR. LAMKEN: Not necessarily so, Your Honor, because Ohio does not preclude price competition. You can file for --

CHIEF JUSTICE ROBERTS: Okay. Now there the answer to my question, and I don't mean to focus on a peculiar structure but your answer was on part 1. You said no, not necessarily. Here there was an injury-in-fact, she might have gotten a better deal.

MR. LAMKEN: She has been exposed -- it's impossible to tell whether or not Fidelity would have been better because of financial settlements or another company would have been better because it has better clean paneling down the road.

JUSTICE SCALIA: And you don't want to have to prove that, because if you proved any damage, there goes your class action --

MR. LAMKEN: Absolutely not.

JUSTICE SCALIA: -- because you don't have commonality.

MR. LAMKEN: The reason we're not -- we did not allege it is because the statute doesn't require it and for 280 years when somebody takes a -- takes a kickback that interferes with your obtaining the best deal possible, that itself was actionable without proving any further --

JUSTICE SCALIA: How does it -- how does it harm her to get a title insurance policy for the price of $453 from what you call a kickback-free seller, as opposed to getting the same title insurance for $453 from a non-kickback-free seller? Is that an injury-in-fact?

MR. LAMKEN: Yes.

JUSTICE SCALIA: The -- the -- the vague notion of -- of buying it from -- from -- I don't know, a white knight? Is -- is that the kind of injury-in-fact that our cases talk about?

MR. LAMKEN: Your Honor --

JUSTICE SCALIA: It seems to me purely -- I don't know, philosophical.

MR. LAMKEN: It's not philosophical at all because that exact right, ensuring that she gets her -- her purchase in a kickback-free transaction is for her

benefit. And when she is denied that right, she has been denied something of potential value that hasn't been denied to everybody else in the universe.

For her protection, she was entitled to have them -- the very fact of the kickback undermines the incentive to pursue her best interest. Like a trust beneficiary, a home buyer spending her money to insure title on her home as a concrete and particularized interest in insuring that those who direct the purchase are not doing it based on kickbacks, which is so undermining -- incentive to seek her best interest.

It may be very hard to prove in individual cases that, you know, fidelity is more financially sound or another has better claims handling. But it was precisely for that reason that Congress got out of the business and courts got out of the business of trying to regulate the underlying economics. They are not going to regulate price. They are not going to regulate quality. And instead, we are going to give you a right to get the referral from somebody who has expertise and who doesn't have a conflict created by a conflict -- by a kickback that so undermines their incentive --

JUSTICE SCALIA: That is Congress wanted to get out of the business. But the issue here is whether Congress can get out of the business, whether it is the

function of courts to provide relief to people who haven't been injured. I mean, that's -- that's -- that's the whole issue.

MR. LAMKEN: Justice Scalia, the Constitution, statutes, the common law regularly create bright line across the board rights to protect underlying financial or other economic interests. Where the right may sweep more broadly or may apply in cases where those underlying inputs are defected. But we don't go look backwards at the purpose of the right, abstract the right to its purpose and say, well, unless it's purpose was -- was achieved in this particular purpose, we're not going to --

JUSTICE ALITO: Would there be injury-in-fact if the plaintiff knew everything that was relevant to this had -- had -- was an economist who had studied the effect of these things on title insurance price and quality, and in fact, had -- was aware of every single transaction that had ever occurred between the title insurance company and the title agent? Would there be injury, in fact, in that situation?

MR. LAMKEN: Yes.

JUSTICE ALITO: And nevertheless said, okay, I understand this is what I'm getting into, but I'm going ahead.

MR. LAMKEN: Yes. There's -- there's injury --

JUSTICE ALITO: There would be injury, in fact"?

MR. LAMKEN: Yes, because he has been denied something he is entitled to, which is another expert's untainted referral, which is not affected by any way by kickbacks, which we know is entirely corrosive in interest to pursue his best interest. You might --

JUSTICE KENNEDY: But -- but it's circular for you to say he was denied something that he is entitled to. The question is whether there is an injury. The Constitution requires an injury.

MR. LAMKEN: Right.

JUSTICE KENNEDY: If you were to say he was entitled to it and therefore, there is an injury, that's just -- that's just circular. That gives no substance at all to the -- to the meaning of the term "injury."

MR. LAMKEN: Yes, but the -- the invasion of a statutory right itself can be injury in fact so long as it is sufficiently concrete and -- and particularized. That you are not just asserting another -- an interest of the public at large.

The Court has protected interests as divorced from property interest, as the right to obtain

information from the government through FOIA or FACA, and it can protect your -- your non-property interest in not being defamed. All of these things are protected. Your rights to performance under contract. All of the these things are protected whether or not there is further economic harm that results.

And the no further inquiry world that is applied in the trust and fiduciary contracts sphere is just another example where the law elevates your interest in not having conflict --

CHIEF JUSTICE ROBERTS: Can I ask you, just to follow up. You said whether or not there is further economic harm. So you say economic harm is required --

MR. LAMKEN: No, I --

CHIEF JUSTICE ROBERTS: -- because there can't be further economic harm if there isn't economic harm in the first place.

MR. LAMKEN: Further, comma, economic harm. Further harm of the economic sort, Your Honor.

CHIEF JUSTICE ROBERTS: Further harm that happens to be economic, not further economic harm.

MR. LAMKEN: Exactly. But I view it to be further harm, much less further economic harm.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Lamken.

Mr. Yang?

ORAL ARGUMENT OF ANTHONY A. YANG,

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIE,

SUPPORTING THE RESPONDENT

MR. YANG: Mr. Chief Justice, and may it please the Court:

When an individual has a statutory right to a kickback-free referral in a financial transaction, she participates in a particular financial transaction in which her right is violated and she pays money for the service unlawfully referred, she has sustained an Article III injury in fact based on, as this Court in its repeatedly explained test, an invasion of a legally protected interest. That is --

JUSTICE SCALIA: Suppose -- Mr. Yang, let me -- me give -- give you a hypothetical. Suppose Congress did this to spare the Attorney General the necessity of suing to enforce these requirements. Suppose Congress wants to take the burden off the back of the Internal Revenue Service.

So it says that anybody who buys any product from a company that has not paid its taxes is entitled to $500, okay? What that person is entitled to is a -- a tax-observant seller -- given a national right to a

tax-observant seller. Would every person who buys from some -- some company that hasn't paid its taxes have a cause of action?

MR. YANG: No.

JUSTICE SCALIA: Why not?

MR. YANG: This Court has explained, I think principally in your opinion in Lujan v. Defenders of Wildlife, that Congress cannot convert an undifferentiated public interest in enforcement of the law --

JUSTICE SCALIA: But this is differentiated. You have to have bought from one of these companies. It's not everybody. Not everybody has bought from these tax cheats.

MR. YANG: I understand.

JUSTICE SCALIA: It's only the people who bought from tax cheats.

MR. YANG: There is also a threshold. Obviously, Congress can't simply narrow the class of -- of plaintiffs to say people with college degrees, or people who were born on a Monday. There needs to be a sufficient connection between the --

JUSTICE SCALIA: A nexus, right? Your brief is full of nexus.

MR. YANG: Would you -- would you --

JUSTICE SCALIA: Legal jargon for "connection."

MR. YANG: We'll use "connection" here.

JUSTICE SCALIA: Lovely. Say connection, I might add. I love it.

(Laughter.)

MR. YANG: We'll say "connection."

But what -- in our view, there needs to be a reasonable connection between the proscribed conduct: here, the paying of taxes, and the class of persons --

JUSTICE SCALIA: Okay.

MR. YANG: -- to which the Congress has conferred the right, and that has to be such that the first class is reasonably regarded as victims of the conduct.

JUSTICE SCALIA: How much of a connection is -- is necessary? Suppose you -- you have a law that requires all machine parts produced by companies to -- to contain a certain feature, and anyone who buys one that doesn't contain that feature gets $500. I purchase one. That feature is of no use to me at all. That product would be just as good for me for the purposes for which I am using it had it not had that feature.

Would that be okay? Would I have a cause of action?

MR. YANG: It's unclear. Let me -- let me try to figure out the hypothetical a little bit further. If Congress -- for instance, if the machine part was a safety harness in your car and you purchased a car with a safety harness but you happen simply, you know, to not use the safety harness, Congress might well be able to, say -- provide for a protection for all purchasers of this particular vehicle or any kind of vehicle, must -- those types of vehicles must have that safety equipment in order to protect the consumers who purchase it.

And in that instance, Congress could well provide for a statutory damage provision to protect such an individual generally.

JUSTICE SCALIA: So even though I've installed my own safety harness, which I always do when I buy a car, I can sue because this car that they sold me didn't have the safety harness. 500 bucks.

MR. YANG: That's correct. And let me -- let me throw out some historical analogues to explain why the focus has to be on the invasion of the legally protected interest. You have things like trespass. At common law -- and this was well known to the framers -- at common law, if you simply step across a boundary line, a line defined in law and the rights that are defined in law that are associated with that line, if

you simply step across this and step back, that is a trespass.

You can bring an action in court, and you could have no -- no impact whatsoever except the invasion of your legal right, and you would get nominal damages. And that type -- similarly, if you have a contract, you could have a breach of the contract.

JUSTICE BREYER: But Justice Scalia has a point. I mean, as I heard it, he was reiterating what used to be called a prudential rule of standing. It wasn't constitutional, but you looked to see if the statute is meant to protect this kind of person against that kind of harm, all right?

And if not, there is lack of prudential standing. Well, if that's the test, his case would fall outside it, because the tax law is not meant to protect the plaintiff there, but this case would fall within it.

MR. YANG: I think it's more than prudential standing. It goes to what is an injury in fact, which the Court has again repeatedly explained is an invasion of a legally protected interest that is sufficiently concrete and particularized.

No, we don't think that Congress can, through the guise of a right, convert a generalized interest in enforcement of the law into something that

an individual can come into --

CHIEF JUSTICE ROBERTS: Why do --

JUSTICE SCALIA: What is the specific -- I'm sorry, Chief, go ahead.

CHIEF JUSTICE ROBERTS: What -- why do we always say injury in fact then? You say so long as the harm is a violation of the law in legally protected interest. Our standing cases always say injury in fact as opposed to injury in law. And you are saying if you violate the law, you have sufficient injury.

MR. YANG: Well, your cases actually say an injury in fact. And then you go on to explain. For instance, in Defenders of Wildlife, that that is invasion of a legally protected interest. I'm not saying it's any invasion of a law, but when Congress confers a right --

CHIEF JUSTICE ROBERTS: Because -- they also go on to say that it has to be concrete.

MR. YANG: Right.

CHIEF JUSTICE ROBERTS: Real and immediate, not conjectural or hypothetical.

MR. YANG: That's right. It can't be an abstract type of a thing; it has to be in a specific factual context that is amenable to judicial -- a realistic judicial appreciation of the consequences --

CHIEF JUSTICE ROBERTS: So that all of our cases, we could have left "in fact" out of all of them. None of them come out differently because we insist on injury in fact.

MR. YANG: Well, I -- I don't know if you could have left it out. You could have called it anything. It is a legal label that the Court has applied to --

CHIEF JUSTICE ROBERTS: The difference between legal harm, though -- isn't that -- I guess I'm just repeating myself. Injury in fact. How do you understand that to be different than any other kind of injury?

MR. YANG: Well, an injury in fact is not simply a legal injury in the sense of any violation of the law, it is an invasion of a legally protected interest with respect to this particular individual, the particular plaintiff.

CHIEF JUSTICE ROBERTS: The two elements, that's the particularized requirement, and I understand that. But you are saying there's -- injury in fact simply means particularized.

MR. YANG: No, no, no, no. It includes several concepts. An injury in fact is an invasion of a legally protected interest. It either has to be actual

or imminent, and it has to be concrete and particularized. Now, again, so there's several concepts within the umbrella of injury in fact.

But I'd like to go back to the examples that we would find at the time of the framing, of many types of injuries, where you don't have to have anything other than an invasion of your legally protected right. For instance, a right to an agreement. If there is a breach that has no impact whatsoever, you would be able to get in and sue.

Now, there is a question of the quantification of damage, but that's separate. That's not whether you have an injury in fact, it is how -- it's the measure of damages, and the measure of damages in common law would be nominal damages.

Similarly, an invasion -- a trespass invasion, or, for instance, if you were a beneficiary of a --

JUSTICE KENNEDY: I'm not sure about trespass. The object of my owning property is that I have a right to exclude. This is what I own. This is what the law protects. This is a spatial area for -- for my -- which is my own domain.

MR. YANG: And why you have that is --

JUSTICE KENNEDY: And there -- there is an

injury to that right. Now --

MR. YANG: But if the right's threatened --

JUSTICE KENNEDY: -- you want to say that Congress can say that you have a right to buy a conflict-free title insurance policy. I'm -- I'm not sure that the two equate.

MR. YANG: Well, going back to your hypothetical, the reason you have that interest, the reason you have the right to exclude this space is solely by operation of the law. Those concepts, they are attached to property rights, were created by common law courts. Just as common law courts can create rights, the invasion of which create interest, so too can a State legislature or when Congress is acting within its Article III power to the one power --

JUSTICE KENNEDY: Well, but it's essential to my -- it's essential to my feeling of security and dignity and privacy. Like Justice Breyer's telephone hypothetical.

MR. YANG: I don't -- I don't think the -- any common law court has inquired whether the invasion of -- the trespass somehow made you insecure --

CHIEF JUSTICE ROBERTS: Trespass cases, it seems to me, are different because you are talking about a property right, and you can sell a property right.

You can go to somebody and say I have the right to keep people off of this piece of property. Do you want to buy it? Here's how much it's worth. But if -- that's only a property right to the extent you can keep people off of it.

Here no one is going to buy this right from the -- the -- the plaintiff, because everybody's got it anyway. You don't -- you don't pay her, because she doesn't have a tangible concrete right. The trespass case, the person obviously does, because he can sell it.

MR. YANG: Well, anything can be monetized.

CHIEF JUSTICE ROBERTS: No, this one -- that's my point. This cannot be monetized because everybody's already got it.

You can answer.

MR. YANG: Well --

CHIEF JUSTICE ROBERTS: It's not really a question, but you can answer.

(Laughter.)

MR. YANG: Well, it is -- it's kind of a statement, although you know in this -- this is specific transaction, this is a transaction involving the plaintiff. She paid money for a service that she got, and it was unlawfully tainted by a kickback and that's the type of thing that traditionally can be enforced in

court.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang. Mr. Panner, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF AARON M. PANNER

ON BEHALF OF THE PETITIONERS

MR. PANNER: Thank you, Mr. Chief Justice. It seems to me that there are two positions that have been articulated before the Court and both are inconsistent with the Court's prior decisions. The first is --

JUSTICE SCALIA: Not yours and his?

(Laughter.)

MR. PANNER: That of the -- that of the plaintiff and that of the government, Your Honor. I should have been more particularized.

(Laughter.)

MR. PANNER: The violation of a duty owed to us, that is what plaintiff claims is the injury here. The violation of a duty is a violation of a duty; it is not injury. And similarly the government says that what is required is a sufficient connection to the conduct, but what is required is not a connection to the conduct, what is required is an injury-in-fact, a harm to the plaintiff who is seeking to obtain redress from the courts. And that fundamental limitation on the role of

the courts is critical to the liberty of the people who come before the courts and who are subject to the power of the courts.

It is absolutely appropriate for someone who has been harmed through the violation of a statutory or common law duty owed to that person to come before the court seeking redress, but what is not possible is for the courts to be open to a plaintiff who has not alleged that the statutory duty -- the statutory violation that has been alleged has caused any adverse impact.

Now of course there are broadly -- there are -- there is illegal conduct that may have caused harm to a broad section of the population. If somebody engages in price fixing and then sells those price fixed goods it may be easy to show that as a result of that many people suffered harm and can come into court to sue for it. Similarly, there are non-financial harms that are the basis for standing in many, many cases: for example, defamation, harm to reputation, discrimination where somebody is subject to a -- an injury of being discriminated against.

JUSTICE SCALIA: What about a -- I'm sorry to interrupt your -- your concluding marks, but I am troubled by the dollar nominal damages for breach of contract. What do you say about that?

MR. PANNER: Well, Your Honor, in -- in a circumstance in which there is a bargain for performance, and it may well be that there is a recognition that there is value that was assigned to that performance that may be hard to measure, and therefore there is a concrete injury that is hard to measure, and the therefore nominal damages is awarded.

Now the cases are not uniform on whether nominal damages are available. There is a -- it's actually split and that there's -- we are not aware of a case in this Court that would say that in a circumstance in which there was a harmless breach, that -- that a suit for nominal damages would establish Article III standing, so with respect to that I'm -- I'm not sure what the answers would be.

Unless the Court has further questions?

CHIEF JUSTICE ROBERTS: Thank you, counsel, counsel.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

Q

Exhibit C

Slip Copy, 2011 WL 293759 (E.D.Ky.)
(Cite as: 2011 WL 293759 (E.D.Ky.))

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. Kentucky,
Northern Division,
at Covington.
Joel SCHILLING, et al., Plaintiffs
v.
KENTON COUNTY, KENTUCKY, et al., Defendants.

Civil Action No. 10-143-DLB.
Jan. 27, 2011.

Eric C. Deters, Eric C. Deters & Associates, P.S.C., Independence, KY, for Plaintiffs.

Jason Vincent Reed, Edmondson & Associates, Covington, KY, Robert Franklin Duncan, Jackson Kelly PLLC, Lexington, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

DAVID L. BUNNING, District Judge.

*1 Plaintiffs Joel Schilling, Charles Schulker, and John Telek commenced this § 1983 action against Kenton County, Kentucky, Kenton County Fiscal Court, Terry Carl, Deputy Baldwin, Southern Health Partners, Inc. (SHP), Dr. Ron Waldridge, Nurse Shawnee as well as various unnamed Defendants, alleging due process and Eighth Amendment violations resulting from Kenton County Detention Center (KCDC)'s "continuing practice" and "policy" of denying inmates adequate medical care while incarcerated. (Doc. # 1, ¶¶ 108-11). Plaintiffs also advance several statutory claims arising under state law and a state law claim for negligence. (Doc. # 1, ¶¶ 112-15). Plaintiffs filed this lawsuit as a purported class action on behalf of themselves and those similarly situated.

The matter is before the Court on Defendants Kenton County, Kentucky, Kenton County Fiscal Court, Terry Carl and Deputy Baldwin's Motion to Dismiss Class Allegations and Claims (Doc. # 8). Defendants moved for dismissal of all class allegations and claims pursuant to Rule 12(b)(6) for failure to state a claim, specifically on the basis that Plaintiffs' proposed putative class is an impermissible "fail-safe" class. The motion having been fully briefed (Docs. # 9, 11), the matter is now ripe for review. For the reasons set forth below, and because Plaintiffs fail to propose a viable putative class that complies with Rule 23, Defendants' motion to dismiss Plaintiffs' class allegations (Doc. # 8) is **GRANTED.**

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts, which have been gleaned solely from Plaintiffs' Complaint, are accepted as true for purposes of addressing Defendants' motion to dismiss. *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228 (6th Cir.2005). This lawsuit was brought by Plaintiffs Joel Schilling, Charles Schulker, and John Telek, all of whom were former inmates at KCDC. Plaintiffs allege they were denied adequate medical care while incarcerated in violation of their Eighth Amendment right to be free from cruel and unusual punishment and in violation of their Fourteenth Amendment right to due process. Plaintiffs assert this denial was part of a systemic prison policy by KCDC and SHP to endorse the deprivation of necessary medical care for inmates. (Doc. # 1, ¶ 43). In filing this lawsuit on behalf of themselves and those similarly situated, Plaintiffs define the proposed putative class the following way:

> [A]ll individuals who, while incarcerated at KCDC (both prior to and after an adjudication of guilt), have been denied medical attention for their serious medical needs, and appropriate and necessary medication prescribed by recognized medical authorities, as a result of Defendants' neglect and deliberate indifference. The Class also consists of all individuals who, while incarcerated at KCDC (both prior to and after an adju-

dication of guilt), have been subjected to intentional physical and mental abuse by Defendants in violation of the Eighth Amendment prohibitions on cruel and unusual punishments, and the Fourteenth Amendment's guarantee of due process and liberty.

*2 (Doc. # 1, ¶ 5). Joel Schilling, Charles Schulker, and John Telek are the representative plaintiffs named in the Complaint, each of whom spent various weekends incarcerated at KCDC during 2009 and 2010.

Plaintiff Joel Schilling

Plaintiff Joel Schilling alleges that in April 2010 he suffered from an untreated enterovirus infection during one of three weekends he served time at KCDC for delinquent child support. (Doc. # 1, ¶ 44). On April 2, 2010, seven days before Schilling was to report for his second weekend of incarceration, he fell and injured himself which required the assistance of his primary care physician the following day. (Doc. # 1, ¶ 45). Schilling self-reported to KCDC on Friday, April 9, 2010, and through Sunday of that weekend he alleges that his complaints of worsening pain were ignored and that KCDC failed to provide him his previously prescribed pain medication in violation of his constitutional rights. (Doc. # 1, ¶¶ 49-52).

A week after Schilling's injury, his primary care doctor prescribed the pain reliever Midrin for his enterovirus infection. (Doc. # 1, ¶ 46). Prior to self-reporting, Schilling called to confirm that he would be allowed his pain medication while incarcerated, to which he received conflicting responses. After his first call, he was told he could bring the Midrin with him to the facility. During a later call that same day, he was told the medication would not be allowed. (Doc. # 1, ¶ 48). Schilling took one last dose of Midrin before self-reporting to KCDC at 6:00 p .m. on April 9, 2010. (Doc. # 1, ¶ 48).

Just hours after reporting, Schilling felt ill and requested to see a nurse from the infirmary after he vomited up his dinner meal. (Doc. # 1, ¶ 49). Allegedly unattended to all night, Schilling was called to report to the medical department the next morning. The nurse confirmed Schilling's temperature was over 100 degrees for which he received "generic Tylenol." (Doc. # 1, ¶ 53). Schilling again vomited after lunch on Saturday, April 10, 2010.

Later in the day, Schilling's fiancé brought his Midrin and Symbicort inhaler to KCDC. (Doc. # 1, ¶ 54). At 5:00 p.m. on Saturday he was given his Symbicort inhaler, but the nurses refused to administer his Midrin. (Doc. # 1, ¶ 57). At dinner, Schilling was unable to keep down his meal, and he alleges the medical department again ignored his medical needs and allowed him to spend "another sleepless night" in KCDC. (Doc. # 1, ¶ 59). On Sunday, Schilling was given his inhaler, but was denied his Midrin. He refused to eat both his breakfast and lunch meals given his inability to keep down food during the previous two days. Once discharged, Schilling was "able to receive adequate healthcare outside" KCDC and fully recovered from his enterovirus infection. (Doc. # 1, ¶ 62).

Plaintiff Charles Schulker

Plaintiff Charles Schulker served two and a half days at KCDC from February 17, 2010 through February 19, 2010 after his arrest on domestic violence charges. (Doc. # 1, ¶ 65). During his transport to KCDC after his arrest, Schulker attempted to jump out of the moving police vehicle. (Doc. # 1, ¶ 65). Given his history of suicidal ideation, he was brought to St. Elizabeth North's emergency room for treatment. Schulker was later discharged to police custody with assurances to the hospital's medical staff that he would remain on suicide watch while incarcerated. (Doc. # 1, ¶ 66).

*3 At the time of his detention, Schulker was a severe diabetic and suffered from a myriad of physical ailments. (Doc. # 1, ¶ 63). He alleges that while incarcerated he was denied his anti-depressive medication, his prescribed number of insulin shots, and developed a staph infection from sitting naked on a concrete floor while on suicide watch. (Doc. # 1, ¶¶ 67-68). Schulker asserts, moreover, that he was

seen by a medical professional and received his insulin shots only once a day despite his need for three shots daily. (Doc. # 67). He contends his repeated requests for medication and treatment went unanswered in violation of his constitutional rights. (Doc. # 1, ¶ 68).

Plaintiff John Telek

Plaintiff John Telek was required to spend his weekends in August 2009 incarcerated at KCDC. (Doc. # 1, ¶ 70). Telek is a type 1 diabetic which, in his case, requires insulin shots before every meal and before going to sleep at night. (Doc. # 1, ¶ 70). Telek alleges that despite need for insulin four times daily, the medical staff at KCDC would monitor inmates sugar levels and administer insulin only twice a day-once in the morning and once in the evening. (Doc. # 1, ¶¶ 73, 77).

Prior to his incarceration, Telek had his physician send his insulin prescription with instructions to the KCDC facility. (Doc. # 1, ¶ 70). Despite these instructions, Telek alleges that he was not properly treated while incarcerated. For instance, he made repeated requests to the medical staff that he receive his insulin shots on a more regular basis; his requests were denied each time. (Doc. # 1, ¶¶ 73, 75, 77, 82-84, 86-90, 92-93, 98, 103, 105). After serving his first two weekends at KCDC, Telek sent an email to Defendant Terry Carl describing the lack of appropriate medical care he was subjected to while incarcerated. (Doc. # 1, ¶ 94). His email requested that Carl direct his medical staff to "follow my doctor's instruction on management of my diabetes during the remaining weekends I have to spend in your facility." (Doc. # 1, ¶ 94).

In the subsequent weekends Telek spent at KCDC he claims that he continued to receive the same deficient care. He was not allowed to check his blood sugar more than twice daily and he continued to receive Lantus insulin rather than his prescribed NovaLog insulin.[FN1] (Doc. # 1, ¶ 96). During Telek's remaining weekends at KCDC, his blood sugar would pendulum swing between soaring and crashing; events Telek believed could have easily led him to a diabetic coma. (Doc. # 1, ¶¶ 94-106).

> FN1. Telek received NovaLog during his last incarceration at the end of August, which is his doctor-prescribed insulin. (Doc. # 1, ¶ 99).

In essence, Plaintiffs believe KCDC has a systematic policy of providing inadequate medical care to inmates in violation of their constitutional rights. (Doc. # 1, ¶ 9). Accordingly, against Defendants, Plaintiffs assert a § 1983 claim for unlawful policy or custom premised on a theory of inadequate medical treatment and failure to properly train deputy jailers to attend to inmates medical needs. (Doc. # 1, ¶¶ 17, 109). Moreover, Plaintiffs claim that Defendants were and continue to be grossly negligent in the level of care KCDC provides its inmates, and in so doing, have violated a variety of state regulations and statutes. (Doc. # 1, ¶¶ 113-15). Plaintiffs claimed constitutional and statutory violations as well as their claim of negligence are alleged as a purported class action. Defendants seek to dismiss Plaintiffs' class allegations as an impermissible fail-safe class. For the reasons that follow, and because Defendants' argument is well-taken, all class allegations and claims will be dismissed in their entirety.

II. ANALYSIS

A. Standard of Review

*4 A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of Plaintiffs' complaint. Federal Rule of Civil Procedure 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In reviewing a Rule 12(b)(6) motion to dismiss, this Court "must construe the complaint in a light most favorable to the plaintiff, and accept all of [his] factual allegations as true. When an allegation is capable of more than one inference,

it must be construed in the plaintiff's favor." *Bloch v. Ribar,* 156 F.3d 673, 677 (6th Cir.1998) (citations omitted). The Court, however, is not bound to accept as true unwarranted factual inferences, *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987), or legal conclusions unsupported by well-pleaded facts. *Teagardener v. Republic-Franklin Inc. Pension Plan,* 909 F .2d 947, 950 (6th Cir.1990).

To survive a motion to dismiss, the complaint "does not need detailed factual allegations," *Twombly,* 550 U.S. at 555, but it must present "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. To satisfy this standard, the complaint must provide "more than labels and conclusions [or] a formulaic recitatiou of the elements of a cause of action." *Id* at 555. The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id* Essentially, the pleading standard Rule 8 announces does not require exhaustive factual allegations, "but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009).

Defendants here filed a motion to dismiss that essentially challenges class certification based solely on the allegations in the complaint. In such a situation, the standard of review is the same as that applied in deciding a motiou to dismiss under Rule 12(b)(6). *Jimenez v. Allstate Indem. Co.,* No. 07-cv-14494, 2010 WL 3623176, at *3 (E.D.Mich. Sept. 15, 2010) (court granted defendants' motion to strike class allegations from the plaintiff's complaint applying a Rule 12(b)(6) standard). The moving party has the burden of demonstrating from the face of the plaintiffs' complaint that it will be impossible to certify the class as alleged, regardless of the facts plaintiffs may be able to prove. *Id.; see also Bryant v. Food Lion, Inc.,* 774 F.Supp. 1484, 1495 (D.S.C.1991). Defendants' motion to dismiss class allegations is therefore akin to a preemptive motion to deny class certification; it is preemptive to the extent that discovery on class certification has not yet commenced.

Although courts generally defer ruling on class certification until discovery on the certification issue is complete aud the plaintiff has moved for class certification, "nothing in Rule 23 prevents a defendant from attempting to preemptively deny certificatiou on the grounds that the prerequisites of Rule 23(a) and (b) can never be satisfied." *Jimenez,* 2010 WL 3623176, at *2; *see Vinole v. Countrywide Home Loans, Inc.,* 571 F.3d 935, 939-40 (9th Cir.2007) ("Nothing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question."). Regardless of who raises the certification issue, the analysis must begin and end with "a rigorous analysis into whether the prerequisites of Rule 23 are met." *American Med. Sys., Inc.,* 75 F.3d 1069, 1078-79 (6th Cir.1996) (quotations omitted); *see Thomas v. Moore USA, Inc.,* 194 F.R.D. 595, 597 (S.D.Ohio 1999)). If Plaintiffs are unable to establish even just one of the prerequisites of subdivisions (a) or (b), the class allegations must be dismissed. *American Med. Sys.,* 75 F.3d at 1079.

B. Rule 23

***5** A class action may not be approved simply "by virtue of its designation as such in the pleadings." *Id.* A plaintiff seeking to certify a class must meet all four requirements of Rule 23(a) and one of the requirements of Rule 23(b). Rule 23(a) identifies four threshold requirements for class certification commonly referred to as numerosity, commonality, typicality, and adequacy of representation, which means (1) the class must be so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the named representatives are typical of the claims and defenses of the entire class; and (4) the named representative will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23. An adequate basis for each

prerequisite must be pled and supported by the facts. *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir.1974).

Rule 23(b)(1) certification is appropriate if the prosecution of individual actions could result in inconsistent or varying judgments. Rule 23(b)(2) permits certification for injunctive and declaratory relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class." And, class certification is appropriate under Rule 23(b)(3) if there are questions of law and fact common to the members that predominate over any questions affecting individual members, provided the class action is the most appropriate vehicle for litigating the claims presented. Fed.R.Civ.P. 23; *see Bremiller v. Cleveland Psychiatric Inst.*, 879 F.Supp. 782, 797 (N.D.Ohio 1995).

i. Class Definition

Despite the absence of an explicit dictate, Rule 23(a) inherently requires that a class be sufficiently definite "so that it is administratively feasible for the court to determine whether a particular individual is a member." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1760 (3d. ed.). Accordingly, "[b]efore delving into the 'rigorous analysis' required by Rule 23, a court first should consider whether a precisely defined class exists and whether the named plaintiffs are members of the proposed class." *Chaz Concrete Co., LLC v.Codell*, No. 3:03-52, 2006 WL 2453302 (E.D.Ky. Aug. 23, 2006) (citing *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 477 (S .D.Ohio 2004)).

Although unique to each case, important elements that form the contour of a putative class are: (1) identification of a particular group that was harmed during a particular time frame, in a particular location, in a particular way; and (2) an order defining the class such that its membership may be ascertained in some objective manner. *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (discussing membership in a proposed class); *Garrish v. United Auto., Aerospace, & Agric. Implement Workers*, 149 F.Supp.2d 326, 331 (E.D.Mich.2001). The class definition should avoid subjective standards such as the plaintiff's state of mind or terms that depend on a merits adjudication. A class definition is therefore too general where it requires the Court to determine whether an individual's constitutional rights have been violated in order to ascertain membership in the class itself. *Catanzano v. Dowling*, 847 F.Supp. 1070, 1078-79 (W.D.N.Y.1994).

*6 Here, Defendants' assert that Plaintiffs' proposed class definition is impermissible in that it creates a fail-safe class. A fail-safe class is "defined by the merits of [the plaintiffs] legal claims, and [is] therefore unascertainable prior to a finding of liability in the plaintiffs' favor." *Velazquez v. HSBC Finance Corp.*, No. 08-4592, 2009 WL 112919, at *4 (N.D.Cal. Jan. 16, 2009). Once it is established that a potential class member will not prevail against the defendant, the member drops from the class. *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 735 (9th Cir.2010). A fail-safe class is inherently deficient in that it "precludes membership unless the liability of the defendant is established." *Id.* at 736. Defining class membership this way is "palpably unfair to the defendant, and is also unmanageable" for obvious reasons; not the least which includes Defendants' inability to provide class notice pursuant to Rule 23(c). *Id.* Plaintiffs argue, however, that the proposed putative class is sufficiently definite, asserting that the definition as proposed does not require resolution of the individual merits of a claim for a determination of class membership. (Doc. # 9 at 7). Moreover, Plaintiffs argue that all Rule 23(a) prerequisites are satisfied and the claims as alleged fall within the ambit of all three Rule 23(b) categories. (Doc. # 9 at 17-20). Contrary to Plaintiffs' assertion, the class definition as proposed fails to comply with Rule 23(a).

In *Turner v. Grant County Detention Center*, No. 05-148-DLB, 2008 WL 821895, at *9 (E.D.Ky. March 26, 2008), this Court denied certification of a civil rights class where the proposed definition re-

quired a merits-based inquiry to determine membership and was too broad to render a sufficiently definite class. Because plaintiffs' proposed definition would have required "an assessment of [an inmate's] circumstances of incarceration," such as whether the detention center should have had a policy in place to protect inmates from the particular harm each suffered, this Court rejected it as unworkable. *Id.*

Similarly, Plaintiffs' proposed class definition is fatally flawed because the Court cannot determine its individual members without reviewing the evidence relative to each KCDC inmates' incarceration, which would amount to a merits-based inquiry of each individual's claim. *Kissling v. Ohio Cas. Ins. Co.*, No. 5:10-22-JMH, 2010 WL 1978862, at *3 (E.D.Ky. May 14, 2010) (court granted defendants' motion to dismiss class allegations where extensive factual inquiry would be required to determine the individual class members ultimately concluding that a "fail-safe class is prohibited."); *Brashear v. Perry Cnty.*, No. 6:06-143-DCR, 2007 WL 1434876, at *2 (E.D.Ky. May 14, 2007) ("Where extensive factual inquiries are required to determine whether individuals are members of a proposed class, class certification is likely improper.").

Plaintiffs in this case define the class as consisting of individuals who while incarcerated were "subjected to intentional physical and mental abuse by Defendants in violation of the Eighth Amendment ... and the Fourteenth Amendment" and were denied "appropriate and necessary" medical care as a "result of Defendants' neglect and deliberate indifference." (Doc. # 1, ¶ 5). This proposed definition improperly requires the Court to make a legal determination that certain inmates at KCDC were deprived of constitutionally adequate medical care or subjected to physical and mental abuse in violation of their constitutional rights, which is impossible to do without reference to the type of deficient care each individual may have received or the type of abuse each individual may have endured. *See Chaffee v. Johnson*, 229 F.Supp. 445, 448 (S.D.Miss.1964) (In denying class certification the court explained "[t]he vague and indefinite description of the purported class depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within ... the alleged class.")

*7 Notably, this Court denied class certification in a case virtually indistinguishable from the one here. In *Holt v. Campbell County*, No. 2:09-cv-82-WOB, Judge Bertelsman denied class certification where Plaintiffs' proposed a class of Campbell County Detention Center inmates who were "denied medical attention for their serious medical needs and appropriate and necessary medication prescribed by recognized medical authorities as a result of Defendants' neglect and deliberate indifference." Almost identical in its definition, Judge Bertelsman rejected certification of this class relying on a previous opinion wherein he determined the discrete factual circumstances relevant to each potential member precluded satisfaction of Rule 23's commonality and typicality requirements.

Plaintiffs argue that Judge Bertelsman's analysis in *Holt* was flawed because he framed the case as a mass tort suit rather than a police misconduct class action. (Doc. # 9 at 7). Plaintiffs cite several purportedly analogous cases that certified civil rights class actions; however, the cases cited define class certification on the basis of very *specific* policies. For instance, a district court approved class certification for a group of female pre-arraignment detainees subjected to strip searches and visual body cavity inspections at Suffolk County Jail. *Mack v. Suffolk Cnty*, 191 F.R.D. 16, 23 (D.Mass.2000). Although the defendants in *Mack* argued that typicality and commonality requirements were not satisfied because each class member was arrested at different times and for different reasons, the Court rejected this argument, finding that the detainees' action was premised on a common legal theory: whether the blanket strip search conducted on each woman was unconstitutional.

The case before this court is distinguishable from *Mack* and the other cases cited by Plaintiffs. The *Mack* plaintiffs identified a sufficiently specific and discrete event-a pre-arraignment strip search or visual body cavity inspection-that allowed the Court to determine class membership by reference to objective criteria. The *Mack* definition identified a particular group that was harmed during a particular time frame, in a particular location, in a particular way. By contrast, Plaintiffs proposed definition is impermissibly broad and lacks sufficient reference to objective criteria. The named Plaintiffs in this Complaint all suffered a different harm that resulted from different types of deprivations. For instance, Plaintiff Schilling was given "generic Tylenol " as a substitute for his prescription pain medication, while Plaintiff Telek was subjected to KCDC's twice daily insulin injection policy even though his condition required more frequent attention. Plaintiff Schulker allegedly suffered the effects of unsanitary confinement in contracting a staph infection while on suicide watch.

These named plaintiffs are not part of a sufficiently definite group of inmates harmed in a particular way by a specific policy such as a discrete pre-arraignment strip search. The named Plaintiffs' allegations are so broad and vary in such significant degree that the Court cannot cull from the Complaint a readily identifiable class of plaintiffs. This Court rejects Plaintiffs' argument in full. Whether Plaintiffs seek to certify a mass tort class action or a police misconduct class action, the proposed class definition must be sufficiently definite to ascertain class membership and must not depend on a merits-based adjudication to determine inclusion.

ii. Rule 23(a) Requirements

*8 The fatal flaw of Plaintiffs' ill-defined class inevitably dooms their ability to satisfy the Rule 23(a) prerequisites, which-out of an abundance of caution-the Court will analyze.

1. Numerosity

Fundamentally, the numerosity requirement assesses whether joinder of all alleged class members would be impracticable, and impracticability depends on the facts and circumstances of each case. *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir.1970). Numerosity cannot therefore be reduced to some strict numerical formula. Rather, the Court must inquire into whether Plaintiffs "have sufficiently demonstrated the existence of the numbers of persons they purport to represent." *Gevedon v. Purdue Pharma*, 212 F.R.D. 333, 337 (E.D.Ky.2002). To do this, the Court should consider "reasonable inferences drawn from the facts before it," *Senter v. General Motors*, 532 F.2d 511, 523 (6th Cir.1976), but it cannot rely on "speculation or conclusory allegations" of the named plaintiffs. *Gevedon*, 212 F.R.D. at 338.

Satisfying the numerosity requirement is impossible as long as the proposed class membership is unascertainable. Because Plaintiffs' proposed definition is wholly dependent on a merits-based resolution of each potential class members' claims, the putative class is a mere apparition until judgment is rendered with respect to each individual claim. This simply runs counter to the purpose of the class action as articulated in Rule 23 given its role as a procedural mechanism intended to foster efficient litigation. Furthermore, it is a violation of Defendants' due process rights to force them to proceed against a class that remains illusory until a final judgment on the merits. *Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 391 (E.D.Tenn.2002), *aff'd* 376 F.3d 554 (6th Cir.2004). The insufficiency of Plaintiffs' class definition therefore precludes satisfaction of the numerosity requirement.

2. Commonality

The commonality requirement is satisfied "as long as the members of the class have allegedly been affected by a *general* policy of the defendant and the general policy is the focus of the litigation." *Rumpke v. Rupmke Container Serv., Inc.*, 205 F.R.D. 204, 208 (S.D.Ohio 2004) (quoting *Sweet v. Gen. Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D.Ohio 1976)). While there only need be one common issue of law or fact it must be common to

all class members. *American Med. Sys.*, 75 F.3d at 1080. "[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988). The existence, though, of just any common question is inadequate because "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What is necessary is a common issue of resolution of which will advance the litigation." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir.1998).

*9 The Eighth Amendment prohibits prison officials from "unnecessarily and wantonly inflicting pain" on prisoners by acting with "deliberate indifference" to prisoners' serious medical needs. *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 895 (6 th Cir.2004) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Mere medical malpractice itself does not constitute a violation of the Eighth Amendment, *Estelle*, 429 U.S. at 106, nor do conditions of confinement that create "mere discomfort or inconvenience." *Talal v. White*, 403 F.3d 423, 426 (6th Cir.2005) (quoting *Hunt v. Reynolds*, 974 F.2d 734, 735 (6th Cir.1992)). The Eighth Amendment is violated only when prison officials demonstrate deliberate indifference to inmates' serious medical needs. *Estelle*, 429 U.S. at 104. A claim of mere negligence, moreover, will not rise to the level of stating a claim; the Defendants' conduct "must demonstrate deliberateness tantamount to intent to punish." *Parks v. Madison Cnty. Fiscal Court*, 22 F.3d 653, 660 (6th Cir.1994) (citations omitted).

In this action, Plaintiffs have presented a common question of law: whether certain inmates at the Kenton County Detention Center suffered an unconstitutional deprivation of medical care. However, to resolve the legal issue presented the Court must delve into the specific facts of each inmate's incarceration and the medical needs relative to that inmate. These highly individualized factual inquires will predominate at trial and, thus, override the appropriateness of the class action with respect to the claims alleged in Plaintiffs' Complaint. (Doc. # 1). The different circumstances relative to each inmate, which may dictate different outcomes and different damages, militates against use of the class action to resolve the matters before this Court. "[T]he commonality requirement will not be met ... if each class members' claim would necessitate an individualized determination of liability." 5 James Wm. Moore, Moore's Federal Practice § 23.23[2]. Accordingly, Plaintiffs' have failed to satisfy this Rule 23 prerequisite.

3. Typicality

Rule 23(a)(3) requires that the claims of the named plaintiffs be typical of the claims or defenses of the rest of the class. Typicality involves an inquiry into the relationship between the injury to the representative plaintiffs and the conduct affecting the entirety of the class such that the Court "may properly attribute a collective nature to the challenged conduct." *American Med. Sys.*, 75 F.3d at 1082 (quoting Herbert B. Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 3-13, at 3-75, 76 (3d ed.1992)). "Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *American Med. Sys.*, 75 F.3d at 1082. Typicality ensures that a class representative will advance the interests of the entire class. In so doing, the typicality prong determines whether-despite the presence of common questions-each class members' claims involves distinctive factual or legal questions such that class certification would be inappropriate.

*10 Here, Plaintiffs attempt to argue that they have been subjected to the same course of conduct claimed to be typical of the class: "the explicit or implicit practice or procedure of KCDC to deny medical attention and prescribed medication to incarcerated individuals." (Doc. # 9 at 16). The only

specific policy to which Plaintiffs' make reference is KCDC's practice of administering insulin to diabetics twice daily. More generally, Plaintiffs' object to an alleged implicit acquiescence among jailers and the facility's medical staff of denying inmates adequate medical care and access to prescriptions. However, this challenge is entirely too broad to render the named Plaintiffs typical of the class.

For instance, Plaintiff Schulker was allegedly denied his anti-depressant medication while incarcerated for a weekend at KCDC, while both Plaintiffs Schulker and Telek were denied insulin injections with the regularity their doctors prescribe; Plaintiff Schilling was denied his prescription pain medication during his two-day stay, but was given generic Tylenol as a substitute. These facts alone warrant against typicality. The facts relative to each Plaintiff present varying degrees of deprivation, sufficiently distinct that they cannot be said to be typical. To implicate an Eighth Amendment violation, Plaintiffs must establish that Defendants' unnecessarily and wantonly inflicted pain in denying medical treatment. *Flanory v. Bonn*, 604 F.3d 249, 253 (6th Cir.2010). A prisoner *must* "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106.

The injuries among the named plaintiffs are also atypical. Plaintiff Schilling contends he was forced to endure excruciating pain because Defendants' denied him his Midrin prescription. Plaintiff Telek suffered from erratic sugar levels that would dip and spike as a result of irregular insulin injections, exposing him to the risk of a diabetic coma. Although a diabetic as well, Plaintiff Schulker apparently did not suffer from dangerously erratic sugar levels, but rather, contracted a staph infection on account of KCDC's allegedly unsanitary confinement conditions. On their face, it appears that Plaintiffs Schilling and Telek's allegations are more accurately termed "denial of medical care" claims, while Schulker's claim with respect to his staph infection is more properly a "conditions of confinement" claim. *Napier v. Laurel Cnty.*, No. 6:06-368-DCR, 2008 WL 544468, at *11 (E.D.Ky. Feb. 26, 2008) ("typicality is also defeated by the range of alleged injuries and potential damages."). The Sixth Circuit has held that where the plaintiffs' claims depends on each individual's unique interactions with the defendant, the typicality requirement is lacking. *Sprague*, 133 F.3d at 399. That is certainly the case here. Accordingly, the typicality prerequisite under Rule 23 is not satisfied.

4. Adequate Representation

***11** Rule 23(a)(4) requires that (1) the class representative have common interests with the unnamed members of the class, and (2) it appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Senter*, 532 F .2d at 524-25. This requirement tests "whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent" and the experience of class counsel for the named plaintiffs. *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir.1977). Whether representation will be adequate is dependent on the Court's determination with respect to typicality "because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *American Med. Sys.*, 75 F.3d at 1083. Accordingly, because typicality cannot be established for the putative class, as defined, adequacy of representation in this case is also lacking.

Finally, because Plaintiff fails to meet the threshold requirements of Rule 23(a), analysis of whether this action should proceed as a class action under one of the subsections of Rule 23(b) is superfluous and will not be considered. *See Ball v. Union Carbide Corp.*, 385 F.3d 713, 727 n. 11 (6th Cir.2004); Fed.R.Civ.P. 23(b) (stating that a class action is only maintainable if Rnle 23(a) is satisfied).

III. CONCLUSION

Plaintiffs' will not be able to establish the prerequisites of Rule 23(a) as the class is currently

defined, thus, dismissal of the class claims alleged is appropriate. The need for highly individualized inquiries to determine whether a KCDC inmate is even a member of the proposed class warrants a conclusion that the class mechanism is not an appropriate method for resolving the issues in controversy.

For the reasons previously stated, **IT IS ORDERED** that:

(1) Defendants Kenton County, Kenton County Fiscal Court, Terry Carl and Deputy Baldwin's Motion to Dismiss Class Allegations and Claims (Doc. # 8) is hereby **GRANTED;**

(2) Plaintiffs' class allegations are hereby **STRICKEN** from the Complaint (Doc. # 1, ¶¶ 5-9).

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(Cite as: 2011 WL 4861882 (W.D.Ky.))

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Only the Westlaw citation is currently available.

United States District Court, W.D. Kentucky,
at Louisiville.
Jana Christine JONES–TURNER, et al., Plaintiffs
v.
YELLOW ENTERPRISE SYSTEMS, LLC d/b/a
Yellow Ambulance Service, et al., Defendants.

Civil Action No. 3:07CV–218–S.
Oct. 13, 2011.

Brent T. Ackerson, Anderson Law Offices, Lawrence L. Jones, II, Jones Ward PLC, Louisville, KY, for Plaintiffs.

Edwin S. Hopson, Mitzi Denise Wyrick, Wyatt, Tarrant & Combs, LLP, Louisville, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

CHARLES R. SIMPSON III, District Judge.

*1 This matter is before the court on motion of the defendants, Yellow Enterprise Systems, LLC d/b/a Yellow Ambulance Service, *et al.*, for decertification of the conditionally certified class of "current and former Emergency Medical Technician/Ambulance Drivers (collectively herein "EMTs") who currently work or previously worked for the Defendants at any time from March 29, 2004 until the present, and who were not paid for all time worked and/or were not paid overtime wages for work in excess of forty (40) hours per week." (the "FLSA [Fair Labor Standards Act] conditional class"). The court also has before it the motion of the plaintiffs, Jana Christine Jones–Turner, *et al.*, for class certification with respect to their state law wage and hour claims, alleging that Yellow Ambulance engaged in an intentional or reckless pattern and practice of violating Kentucky law with regard to its employees' rights to lunch breaks, rest breaks and overtime pay. For the following reasons, the motion to decertify the FLSA conditional class (DN 76) will be granted and the motion for certification of a state wage and hour class (DN 77) will be denied.

In this action, the plaintiffs allege that Yellow Ambulance must compensate them for the automatic deduction of thirty minutes' pay which was not re-credited to them for occasions when they did not receive a meal break during a shift or when they did not receive an FLSA-satisfactory meal break. They also allege that they were frequently denied rest breaks and were not paid for acting as "preceptors" at training sessions for new emergency medical technicians. The standard for conditional certification being much more lenient than certification later in the litigation, the court granted conditional certification of the proposed FLSA class. Notice was sent to over 900 current and former EMTs. 77 chose to join to "opt-in" to the action.

The parties agree that the FLSA does not require that meal and rest breaks be provided. However, where a meal break is provided but an employee is not completely relieved of his duties for an uninterrupted thirty-minute period, the meal break becomes compensable, as the employee remains essentially on-the-clock for the benefit of the employer. Since approximately 1999, it has been Yellow Ambulance's policy to pay its employees for 8 hours for an 8 1/2 -hour workday, deducting for a 30–minute unpaid meal break. Due to the nature of the work, meal breaks are not guaranteed. In order to ensure that they are paid for all time worked, employees must submit a "missed lunch slip" so that the missed meal time is properly compensated.

There is nothing inherently impermissible about the means by which Yellow Ambulance calculates its employees' pay. Indeed, the plaintiffs state in their response brief that "the FLSA [portion of the] case is about whether or not Yellow had a policy of providing its employees with thirty minute uninterrupted meal breaks, thus making the

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time a bona fide meal break. If the employees were completely relieved of their duties for an uninterrupted thirty-minute period, then Yellow's practice of deducting thirty minutes of pay was lawful. If, however, the employees were "on stand-by" status and thus "engaged to wait" for the next run, then Yellow's automatic deductions are tantamount to theft from its own employees." Response, p. 2. The court in *Saleen v. Waste Management, Inc.*, 649 F.Supp.2d 937, 940 (D.Minn.2009) faced similar facts:

> ***2** Plaintiffs do not contend that any of WMI's written policies are, on their face, illegal. To the contrary, plaintiffs concede that WMI may, consistent with the FLSA, presume that employees take a half-hour meal break. Plaintiffs also concede that WMI may ask employees to inform WMI when they work through lunch. Plaintiffs further agree that, as long as WMI reverses the half-hour deduction when it becomes aware that a worker has not taken a meal break, WMI does not act unlawfully. This is exactly what WMI's written policy requires, and, according to WMI, this is exactly what WMI does.

The wrong allegedly inflicted upon the employees in the case at bar does not derive from the automatic deduction of thirty minutes' pay, a condition common to all EMTs. Rather, the alleged injury results from a failure to pay EMTs for compensable meal time (*ie.*, a missed or otherwise FLSA-unsatisfactory meal) if and when it occurs.

The EMTs in the case at bar are unlike the plaintiffs in *Crawford v. Lexington–Fayette Urban County Government*, 2008 WL 2885230 (E.D.Ky. July 22, 2008), corrections officers (1) who all allegedly performed tasks, though varied, during their lunch breaks; and (2) who, while on break, remained the only staff who could respond to emergency situations, and were required to so respond. The court in *Crawford* certified the class of plaintiffs, finding that they all shared a common claim that they did not receive a bona fide meal break. *Id.* at p. 8.

By contrast, the EMTs at Yellow Ambulance are required to request approval for a lunch break and provide their exact location. Dispatchers approve or disapprove meal breaks depending upon call volume and available units, and breaks are not guaranteed. Breaks are more readily available on some shifts than others. Yellow Ambulance has adduced evidence that (1) whether EMTs, in fact, call in for meal breaks or turn in a "missed lunch slip" has varied from individual to individual; (2) all employees are encouraged to take advantage of slower periods and take a meal break; (3) all employees receive orientation concerning the company's policies and procedures; and (4) some employees have followed the company's procedures and were compensated for missed lunches.

It is unclear from the briefs what results from a dispatcher's approval of a lunch break. Whether a given EMT is completely relieved of his duties, remains in on-call status, or something in between appears to be a function of the availability and proximity of other units and the call volume at any given time. Further, remaining in on-call status does not, in and of itself, mandate a finding that EMTs' meals are compensable. *ie., Brinkman v. Department of Corrections of State of Kansas*, 804 F.Supp. 163 (D.Kan.1992); *Barefield v. Village of Winnetka*, 81 F.3d 704 (7th Cir.1996); *Harris v. City of Boston*, 253 F.Supp.2d 136 (D.Mass.2003).

The plaintiffs also raise concerns about the record-keeping system, and the processing of "re-credits" for missed meal breaks. They contend, for example, that a management official would deny a request for re-credit if she found any period of downtime in a shift, and that even where she determined to re-credit the time, there were occasions when the adjustment was never made. Pl. Resp. Br., pp. 24. Thus, as the plaintiffs' own brief evidences, a multitude of factors are implicated in determining whether EMTs at Yellow Ambulance were properly paid. The analysis is highly individualized in this case.

***3** District courts have granted motions to de-

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certify a conditionally certified class where there was great variety in the factual allegations among the individual plaintiffs. *Proctor v. Allsups Convenience Stores, Inc.*, 250 F.R.D. 278, 281 (N.D.Tex.2008). As in *Allsups*, there has been no showing of a "single decision, policy, or plan resulting in the alleged failure to properly compensate EMTs at Yellow Ambulance. *See also, Johnson v. TGF Precision Haircutters, Inc.*, 2005 WL 1994286 (S.D.Tex. August 17, 2005) (Plaintiffs' allegations of overarching policy to deny overtime not borne out by manual instructing emp'ees to ensure accurate timesheets). The "similarly situated" factor is evaluated under a heightened evidentiary standard on a motion to decertify the conditional class. *Valcho v. Dallas County Hospital District*, 574 F.Supp.2d 618, 622–23 (N.D.Tex.2008), *citing Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F.Supp.2d 493, 497–98 (D.N.J.2000); *Lugo v. Farmer's Pride, Inc.*, 2008 WL 638237 at *3 (E.D.Pa. March 7, 2008). As the plaintiffs have not been shown to be similarly situated, the conditionally certified class must now be decertified.

The plaintiffs have moved under Fed.R.Civ.P. 23 for certification of a class consisting of:

> Current and former Emergency Medical Technicians, Ambulance Drivers, Paramedics and Dispatchers who currently work or previously worked for the Defendants at any time from March 29, 2002 until the present, and (a) who were not paid for all time worked and/or were not paid overtime wages for work in excess of forty (4) hours per week as required by Kentucky law; (b) who were not grauted meal breaks in accordance with KRS 337.355; (c) who were not granted rest breaks every four hours as mandated by KRS 337.365; and (d) who were subjected to automatic pay deductions for meals without verification of whether or not they received uninterrnpted meal breaks as required by Kentucky law.

(The "state wage and hour class"). This proposed class is an improper "fail-safe" class under *Randleman v. Fidelity National Title Insurance Co.*, 646 F.3d 347, 2011 WL 1833198 (6th Cir.2011) [FN1], in that the class definition "shields the putative class members from receiving an adverse judgment. Either the class members win, or by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Id.* at 4. Thus, in order to ascertain who is a member of the class, the merits of each individual employee's claims would need to be reached, thus defeating the suggestion that class treatment would be appropriate. Further, the class cannot not be certified under Fed.R.Civ.P. 23(b)(2), as money damages are sought which are not incidental to the injunctive relief demanded in this case. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, 2011 WL 2437013 (2011). Plaintiffs do not urge otherwise. Rather, they simply argue, without a valid basis, that *Wal–Mart Stores* does not apply herein.

> FN1. In response to the defendants' contention that the proposed class contains only "winning" plaintiffs, the plaintiffs' offer the observation that the court has the power to alter the proposed class designation and could certify a class of all Yellow Ambulance EMTs, ambulance drivers, paramedics and dispatchers employed at any time from March 29, 2002 to the present. First, the plaintiffs have not made an actual request to alter the proposed class sought to be certified. The off-hand remark concerning alteration of the class designation appears at DN 89, p. 3 in response to the defendants' request for leave to file a supplemental brief. Second, tbis proposed class of all current and former employees is overbroad and lacks any relationship to the claims asserted in this action.

*4 Therefore, motions having been made and for the reasons set forth herein and the court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that

(1) The motion of the defendants, Yellow Enterprise Systems, LLC d/b/a Yellow Ambulance

Service, *et al.*, for decertification of the conditionally certified class (DN 76) is **GRANTED** and the opt-in plaintiffs are **DISMISSED WITHOUT PREJUDICE.**

(2) The motion of the plaintiffs, Jana Christine Jones–Turner, *et al.*, for Rule 23 class certification of state law claims (DN 77) is **DENIED.**

IT IS SO ORDERED.

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